'THERE ARE MISTAKES, AND THEN THERE ARE MISTAKES': JURISDICTIONAL ERROR REVISITED IN STANLEY V DIRECTOR OF PUBLIC PROSECUTIONS (NSW)

JOSHUA WOODYATT* AND IMOGEN MCINTYRE**

I INTRODUCTION[1]

The topic of jurisdictional error in Australia has received much consideration, between the two key High Court cases in this space – *Craig v South Australia* ('*Craig*')[2] and *Kirk v Industrial Court (NSW)* ('*Kirk*')[3] – and a body of subsequent academic commentary and case law.[4] It has at its heart two imperatives: the fundamental principle that decisions should be taken within the limits of the decision-making power conferred by Parliament,[5] and the compelling policy argument that the finality of judicial determination will be upended if the spectre of such error looms too large over exercises of judicial power such as the

* Research Associate, Australian National University Centre for European Studies. Email: Joshua.Woodyatt@anu.edu.au. All views and opinions expressed in this case note are those of the authors, and the authors alone, as are any errors or omissions. The authors wish to record their thanks both for the thoughtful and considered feedback of the two anonymous peer reviewers as well as for the deeply insightful comments received from their colleagues, which have measurably improved our work.

** Undergraduate, University of Sydney Law School.

1 Title quote taken from Gageler J's dissenting judgment in *Stanley v DPP (NSW)* (2023) 407 ALR 222, 227 [17] ('*Stanley*'), citing *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416, 420 (Jordan CJ, Davidson and Street JJ agreeing at 423); *Wang v Farkas* (2014) 85 NSWLR 390, 400 [42] (Basten JA, Bathurst CJ agreeing at 392 [1], Beazley P agreeing at 392 [2]).

2 (1995) 184 CLR 163 ('*Craig*').

3 (2010) 239 CLR 531 ('*Kirk*').

4 See, eg, Aaron Moss, 'Tiptoeing Through the Tripwires: Recent Developments in Jurisdictional Error' (2016) 44(3) *Federal Law Review* 467 <https://doi.org/10.1177/0067205X1604400306>; Robin Creyke et al (eds), *Control of Government Action: Text, Cases and Commentary* (LexisNexis, 6th ed, 2021) 854–65; *Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 96 ALJR 819; *FKV17 v Minister for Home Affairs* (2022) 292 FCR 201; *Franklin v DPP (NSW)* (2022) 109 NSWLR 198.

5 See, eg, Roger Douglas et al, *Douglas and Jones's Administrative Law* (Federation Press, 8th ed, 2018) 313–14; Chief Justice Robert S French, 'Administrative Law in Australia: Themes and Values Revisited' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 24, 31–3 <https://doi.org/10.1017/CBO9781107445734.003>; Peter Cane, Leighton McDonald and Kristen Rundle, *Principles of Administrative Law* (Oxford University Press, 3rd ed, 2018) 5–7.

sentencing process.[6] The High Court's 4:3 decision in *Stanley v Director of Public Prosecutions (NSW)* ('*Stanley*') concerns a relatively rare finding of jurisdictional error on the part of the District Court of New South Wales,[7] made in the course of deciding whether to make an intensive correction order ('ICO') upon sentencing a guilty defendant. Though differing in their applications of authority, neither the joint judgment nor the dissenting judgments varied from the two seminal cases concerning inferior court jurisdictional error, *Craig* and *Kirk*. That said, the Court's finding that the sentencing Judge exceeded her power to order an ICO by failing to undertake the assessment required by the ICO regime has important consequences for judicial officers and practitioners involved in the sentencing process in New South Wales. This case note seeks to detail the reasoning of Gordon, Edelman, Steward, and Gleeson JJ – as well as that of each of Kiefel CJ, Gageler J and Jagot J in dissent – and to forecast *Stanley*'s consequences for the exercise of sentencing discretion going forward. It will posit that *Stanley* has reiterated a legalistic approach to the review of discretionary powers such as that provided under section 66 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ('*CSP Act*'), but that its implications, although significant for the New South Wales ICO regime, are effectively localised to that context.

II PROCEDURAL HISTORY

Emma-Jane Stanley pleaded guilty in the Local Court of New South Wales at Dubbo to 10 firearms offences under the *Firearms Act 1966* (NSW) and was sentenced to an aggregate three years' imprisonment term with a two-year non-parole period. On severity appeal to the District Court under section 11(1) of the *Crimes (Appeal and Review) Act 2001* (NSW), her counsel accepted that only a sentence of imprisonment was appropriate but argued that it should be served in the community under an ICO, per section 7(1) of the *CSP Act*. N Williams DCJ

6 See *Stanley* (n 1) 226 [17] (Gageler J), and the authorities cited there by his Honour at n 15. See generally, on the importance of finality, *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 603 [8] (Gleeson CJ): 'The requirements of good administration, and the need for people affected directly or indirectly by decisions to know where they stand, mean that finality is a powerful consideration'.

7 In the five years prior to *Stanley*, there have only been a handful of findings of jurisdictional error on the part of the District Court of New South Wales. See *Purcell v DPP* [2021] NSWCA 269; *Huang v Nazaran* (2021) 106 NSWLR 219; *Franklin v DPP (NSW)* [2021] NSWCA 83; *Jankovic v DPP* (2020) 281 A Crim R 378; *DPP (NSW) v Hamzy* (2019) 101 NSWLR 405; *Dempsey v DPP* [2019] NSWCA 267; *DPP (Cth) v Haddad* (2019) 367 ALR 269; *DPP (NSW) v Kmetyk* (2018) 85 MVR 25. See also *Voicu v The Owners-Strata Plan No 1624* [2020] NSWCA 52, where jurisdictional error was found on the part of the District Court, but the end result arrived at by that Court was in any event sustained on appeal. Post-*Stanley*, see *Cooper v DPP (NSW)* [2023] NSWCA 65 (involving jurisdictional error by the Drug Court of New South Wales); *State of New South Wales v Hollingsworth* [2023] NSWCA 152 (where 'real doubts' were expressed as to whether either legislation or inherent jurisdiction could support an order made by a District Court Judge concerning the conduct of a psychiatric assessment: see [88]–[92] (Stern JA, Mitchelmore JA agreeing at [1]), [141]–[157] (Basten AJA)).

dismissed that appeal after giving 'very close consideration' to the appropriateness of an ICO, with the sentence imposed at first instance standing.[8]

Ms Stanley duly filed a summons for judicial review in the Court of Appeal, seeking a writ of certiorari to have the decision quashed and the matter remitted to the District Court. She argued that, in failing to have regard to section 66 – and specifically subsection (2) – of the *CSP Act*, the judge had not qualified their authority to impose any sentence of imprisonment, with this amounting to jurisdictional error amenable to the Supreme Court's supervisory jurisdiction. Section 66 of the *CSP Act* prescribes the assessment to be made by a sentencing officer when the power to make an ICO is enlivened. Subsection (1) requires that community safety be the 'paramount consideration', and subsection (2) asks the court to assess, as against that paramount consideration, which of an ICO or full-time detention is more likely to address the offender's risk of reoffending. The Court of Appeal (Bell P, Basten, Leeming and Beech-Jones JJA agreeing, McCallum JA dissenting) accepted (or assumed) that the primary judge had failed to undergo this assessment in section 66(2), but decided that this did not constitute jurisdictional error.[9] The majority of the Court of Appeal held that the section 66 assessment was not a condition of the exercise of discretion to order a sentence of imprisonment, and that a decision not to order an ICO was separate and subsequent under section 7(1) and could not infect the validity of the custodial sentence.[10] While emphasising that the binary nature of the relevant sentencing process did not make it a separate function for the purposes of determining the jurisdictional error,[11] the Court held that there was no such error, briefly addressing the 'cardinal importance' of the distinction between finding an error to be within/without jurisdiction,[12] and noting the immense practical significance of that distinction for the court.[13] Their Honours stressed the value of finality of reasons here, as reinforced by section 176 of the *District Court Act 1973* (NSW), whose privative clause limits the Court of Appeal's supervisory jurisdiction to questions of jurisdictional error.[14] These factors furnished the conclusion that Parliament could not have intended to invalidate a sentence involving noncompliance with the statutory direction at section 66(2), where the consequences thereof would threaten

8 *Stanley v The Queen* (District Court of New South Wales, N Williams DCJ, 17 June 2021) ('*Stanley* (NSWDC)'), as excerpted in the judgment of Jagot J: *Stanley* (n 1) 272 [224].

9 *Stanley v DPP (NSW)* (2021) 107 NSWLR 1, 8 [25], 8–16 [28]–[64] (Bell P), 34–5 [138]–[140] (Basten JA), 35 [141], 37–8 [149]–[157] (Leeming JA), 46–8 [190]–[194] (Beech-Jones JA) ('*Stanley* (NSWCA)').

10 Ibid 14–15 [54]–[57] (Bell P), 47–8 [193]–[194] (Beech-Jones JA). The majority of the Court of Appeal held to this end that *Wany v DPP (NSW)* (2020) 103 NSWLR 620 ('*Wany*'), which found that failure to consider risk of reoffending as required by section 66(2) was a jurisdictional error, was wrongly decided: see *Stanley* (NSWCA) (n 9) 13 [50] (Bell P), 34–5 [138]–[139] (Basten JA), 38 [157] (Leeming JA), 47 [193] (Beech-Jones JA). See also *Quinn v DPP (Cth)* (2021) 106 NSWLR 154, 176–84 [88]–[125] (Leeming JA), 195–6 [189]–[191] (Simpson AJA) ('*Quinn*').

11 *Stanley* (NSWCA) (n 9) 37 [152] (Leeming JA).

12 Ibid 10 [35]–[36] (Bell P).

13 Ibid 12 [43].

14 Ibid 8–9 [29]–[33].

the orderly administration of justice.[15] The appellant's argument that a jurisdictional error could be established by the Judge's fundamental misconception of her function found favour only with McCallum JA (as the Chief Justice of the Australian Capital Territory then was).[16] This was because the failure of a judicial officer to apply section 66(2) overlooks the indispensable nature of that provision to the process of assessing community safety as the 'paramount' consideration, and the failure to find jurisdictional error therein tends to overlook the solemnity and institutional importance of the sentencing power generally.[17] The Court of Appeal thus dismissed the summons on the basis that no jurisdictional error had occurred, and accordingly that no power existed for the court to correct an error of law otherwise made within jurisdiction. The appellant was granted special leave to appeal to the High Court.[18]

III THE MAJORITY JUDGMENT

A majority of the High Court – Gordon, Edelman, Steward and Gleeson JJ – was satisfied at the hearing's conclusion both that the sentencing Judge failed to conduct the requisite section 66(2) assessment process in declining to grant an ICO, and that that failure constituted a jurisdictional error reviewable by the Supreme Court.[19] They began by reiterating *Craig* to the effect that a lower court either (1) misconstruing the statutory source, nature, or function of its powers, (2) misapprehending the limits of those powers, or (3) disregarding a statutory precondition of those powers' exercise, will fall into jurisdictional error.[20] According to those authorities, their Honours found the sentencing Judge had made errors of the second and third kind.[21]

A The Power to Make an ICO

Gordon, Edelman, Steward and Gleeson JJ next established the 'discrete character' of the power to order an ICO (as did those justices in dissent, albeit with different consequences), reading it as separate to the power of sentencing to imprisonment under the *CSP Act*.[22] Their Honours made this distinction based upon both the language of section 7(1) – which enlivened the prospect of an ICO separately, and only after a sentence of imprisonment has been reached – and the consequences of an ICO breach, which are addressed separately in the *CSP Act* from breaching a term of imprisonment.[23] While accepting that the power to make

15 Ibid 34 [134]–[137] (Basten JA, Bell P agreeing at 15 [59], Leeming JA agreeing at 38 [157]).
16 Ibid 45 [185] (McCallum JA).
17 Ibid 39–41 [164]–[170].
18 Transcript of Proceedings, *Stanley v DPP (NSW)* [2022] HCATrans 139, 609–11 (Keane J) ('*Stanley* (Special Leave Application)').
19 *Stanley* (n 1) 234 [52] (Gordon, Edelman, Steward and Gleeson JJ).
20 Ibid 235–6 [55]–[57], quoting *Craig* (n 2) 177–8 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).
21 *Stanley* (n 1) 234–5 [54], citing *Kirk* (n 3) 573–4 [72] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
22 *Stanley* (n 1) 237–8 [62]–[64].
23 Ibid.

an ICO was discretionary, they held that a 'corresponding duty' exists to exercise that discretion where an ICO is applicable (that is, not otherwise precluded by statute) and properly raised in the matter.[24] Where this duty is enlivened, the discretion to order an ICO is treated as a power in itself.[25] Deciding a sentence of imprisonment is thus a three-step process – the determination that no penalty other than imprisonment is appropriate, the power to determine sentence length, and, where enlivened, the power to order that the sentence of imprisonment be served in the community by way of an ICO.[26] Thus, where that discretionary power is enlivened, the sentencing Judge is required to address the considerations provided under the *CSP Act* in exercising the power to order an ICO (or not).[27]

Next, their Honours considered the several statutory restrictions operating on the power to order an ICO, including where one cannot be ordered (such as for certain offences or by virtue of sentence length),[28] and that an order can only be made if the offender's sentencing assessment report deems it appropriate.[29] Both were accepted as limits on the jurisdiction to order an ICO.[30] Their Honours then came to section 66, which lay at the heart of the case, and which provided in summary that:

1. 'Community safety *must* be the paramount consideration' when considering an ICO;[31]
2. That 'the sentencing court *is to assess*' whether community safety and the risk of reoffending would be better served by an ICO or full-time detention;[32] and
3. That the court '*must also* consider' both section 3A of the Act (on the purposes of sentencing) and 'any relevant common law sentencing, and…other matters that [it] thinks relevant'.[33]

Their Honours considered that subsection (1), making community safety a paramount consideration, and subsection (2), providing a framework for appraising community safety by reference to the risk of reoffending,[34] together comprised a consideration qualifying the sentencing court's power to make or refuse an ICO under section 7(1).[35]

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24 Ibid 238 [65], quoting *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389, 398 (Latham CJ, Rich, Dixon, McTiernan and Webb JJ).
25 *Stanley* (n 1) 238 [66].
26 Ibid 236–7 [59].
27 Ibid 238 [66].
28 Ibid 238–9 [67]–[69]. See *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 4B, 7(3), 17D(1)–(3) ('*CSP Act*'); *Crimes (Sentencing Procedure) Regulation 2017* (NSW) cl 12A.
29 *Stanley* (n 1) 239 [70]. See *CSP Act* (n 28) ss 69, 73A(3).
30 *Stanley* (n 1) 239 [69]–[70].
31 Ibid [71] (emphasis in original), quoting *CSP Act* (n 28) s 66(1).
32 *Stanley* (n 1) 239 [71] (emphasis in original), quoting *CSP Act* (n 28) s 66(2).
33 Ibid, quoting *CSP Act* (n 28) s 66(3).
34 Ibid 240 [75].
35 Ibid 241 [78].

B The Jurisdictional Character of Section 66

Looking to the *CSP Act*'s language, the majority noted that section 66 was couched in a division titled '[restrictions] on power to make [ICOs]'.[36] This, their Honours held, reflected a legislative intention that 'sentencing courts are not "islands of power immune from supervision and restraint"'.[37] Failure to consider community safety, as subsections (1) and (2) require, thus 'tends to defeat the evident statutory aim of improving community safety through … an alternative way to serve sentences of imprisonment'.[38] This conclusion was bolstered by reference to the second reading speech introducing section 66,[39] which reinforced that 'the conduct of the assessment in section 66(2) is a prescribed and essential aspect of giving "paramount consideration" to community safety, as s 66(1) requires'.[40] It was this essential quality of the section 66 consideration process which their Honours held elevated the case above non-jurisdictional failure of mandatory consideration. The Judge had, in failing to properly consider the paramount consideration at section 66(1) through the section 66(2) lens, misconceived her function under section 7.[41] Crucially, their Honours noted the absence of a provision protecting failure to consider section 66 from invalidity, which they held reflected a deliberate legislative choice to ensure that community safety was accounted for in the decision whether to order an ICO.[42] Taken together, Gordon, Edelman, Steward and Gleeson JJ found that section 66, and the paramount consideration of community safety therein contained, 'operates as a limit on the power of the sentencing court to make or refuse to make an ICO'.[43] It is the effect of section 66(2) which assumed the most significance here. Failure to consider community safety *expressly in light of the risk of reoffending* as required by section 66(2) was what constituted jurisdictional error by the sentencing Judge.

C The District Court Judge's Reasoning Vis-à-vis Jurisdictional Error

After dismissing the dissenting view of the 'manifest inconvenience' of a declaration of invalidity[44] – dealt with in greater detail below[45] – the majority finally turned to the District Court Judge's reasoning, and how it was that those reasons had failed to consider section 66 in the circumstances.[46] There was no dispute that, in rehearing before the District Court, the prospect of an ICO had been properly raised for consideration, and that no statutory exclusions applied to preclude that consideration. However, in responding to Ms Stanley's Community Corrections plan, the sentencing Judge did not expressly connect an evaluation of

36 Ibid [79].
37 Ibid, quoting *Kirk* (n 3) 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
38 *Stanley* (n 1) 241 [80].
39 Ibid 242–3 [84], quoting New South Wales, *Parliamentary Debates*, Legislative Council, 11 October 2017, 273 (Mark Speakman, Attorney-General).
40 *Stanley* (n 1) 243 [86].
41 Ibid 243–4 [88].
42 Ibid 244–5 [89]–[95]. Cf *Stanley* (NSWCA) (n 9) 14–15 [54]–[57] (Bell P); see below n 102.
43 *Stanley* (n 1) 245 [95].
44 Ibid 226 [17] (Gageler J).
45 See below at Part IV.
46 *Stanley* (n 1) 245–6 [96]–[100] (Gordon, Edelman, Steward and Gleeson JJ).

community safety to her risk of reoffending under that plan.[47] Rather, their Honours found that 'the District Court Judge infused that concept with notions of general deterrence'.[48] This analysis was another point of departure from the dissenting judgments,[49] with Gordon, Edelman, Steward and Gleeson JJ not accepting that the sentencing Judge's 'very close consideration' of an ICO's 'appropriateness' rose to the explicit consideration required by section 66.[50] In their Honours' view, that the sentencing Judge was 'very aware' of community safety's importance was *not* the same as being able to infer that her Honour had had sufficient regard to section 66.[51] Indeed, the sentencing Judge did not 'specifically or in substance' mention section 66,[52] with the majority unwilling to infer from her Honour's general language that she had adequately considered that section.[53] Even her Honour's overt references to relevant precedent,[54] and acknowledgement of 'the three step process that must be followed by the Court in assessing whether or not an ICO is appropriate',[55] were deemed insufficient.[56] Ultimately, the failure to *expressly* contemplate whether an ICO would be more likely to address Ms Stanley's reoffending risk than full-time imprisonment, to postulate the possible conditions which might attend an ICO were one imposed, and to consider the unique circumstances of her offending vis-à-vis community safety, vitiated the sentencing Judge's reasoning.[57] Put simply, '[the] inescapable conclusion is that the District Court Judge failed to undertake the assessment in s 66(2)'.[58] The District Court – being duty-bound to undertake the section 66(2) consideration – had therefore failed to determine Ms Stanley's appeal according to law. This constituted a jurisdictional error of both the second and third types – the sentencing Judge having 'disregarded … a matter that the relevant statute requires be taken to account as a condition of jurisdiction', and 'misconstrued … the relevant statute thereby misconceiving the nature of the function which [she was] performing'.[59] The matter was duly remitted to the District Court for proper determination.[60]

47 Ibid 248 [107].
48 Ibid.
49 See especially Jagot J's dissenting judgment in *Stanley* (n 1) 275 [238]–[239].
50 Ibid 248 [109] (Gordon, Edelman, Steward and Gleeson JJ).
51 Ibid.
52 Ibid 249 [112]–[113], citing '*Stanley* (NSWDC)' (n 8).
53 Ibid [110]–[113].
54 See, eg, *R v Zamagias* [2002] NSWCCA 17; *Truong v The Queen* [2013] NSWCCA 36; *R v Howard* [2004] NSWCCA 348; *R v Pullen* (2018) 275 A Crim R 509; *R v Fangaloka* [2019] NSWCCA 173; *Karout v DPP (NSW)* [2020] NSWCCA 15; *Casella v The Queen* [2019] NSWCCA 201.
55 *Stanley* (n 1) 248 [109], quoting *Stanley* (NSWDC) (n 8).
56 Ibid 248–9 [109]–[113].
57 Ibid 249 [113]–[114].
58 Ibid 250 [115].
59 Ibid 234 [54], citing *Kirk* (n 3) 574 [72] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
60 Ibid 250 [118].

IV DISSENTING JUDGMENTS

A Kiefel CJ and Gageler J

The three Judges in dissent – Kiefel CJ, Gageler J and Jagot J, each writing a separate judgment – were in agreement on two main positions:

1. That the power to sentence an offender to a term of imprisonment is not conditioned upon section 66 considerations; and
2. That noncompliance with section 66 does not constitute jurisdictional error.

Kiefel CJ adopted Jagot J's analysis as regards section 66,[61] and endorsed Basten JA's observation in the Court of Appeal decision that that section is better described as a direction that considerations of community safety should be taken into account,[62] and 'a reminder … that giving paramount effect to community safety does not require incarceration'.[63] Her Honour iterated that subsection (2) should not be read in isolation from the other statutory considerations informing the ICO regime, and concluded that it 'is not possible to infer that Parliament intended the obligation under section 66(2) to condition the validity of the sentencing process'.[64]

Gageler J, while also adopting Jagot J's section 66 analysis,[65] noted particularly the public policy consequences which might flow from a determination of jurisdictional error in the case.[66] Describing the potential uncertainty of 'never knowing whether an order made … by an inferior court was valid unless and until [determined on appeal]' as a 'manifest inconvenience',[67] his Honour grounded his analysis in *Craig* and *Kirk*.[68] Stressing the importance of courts as arbiters, and thus, the social imperative of finality in their decision-making,[69] Gageler J reiterated those precedents to the effect that an inferior court's failure to consider something in the course of exercising a power otherwise within jurisdiction 'will not ordinarily involve jurisdictional error'.[70] Addressing the ICO regime directly, his Honour drew two conclusions. The first was that the power to sentence an offender to imprisonment was not conditional on the proper exercise of the section 7(1) power to make/not make an ICO. Analysing the relevant provisions of the *Crimes (Administration of Sentences) Act 1999* (NSW), his Honour agreed in substance with Gordon, Edelman, Steward and Gleeson JJ that the power of sentencing to imprisonment and the power to make an ICO were distinct.[71] That

61 Ibid 225 [9].
62 Ibid [10].
63 Ibid.
64 Ibid [11]–[12].
65 Ibid 228 [23].
66 Ibid 225–6 [14]–[17].
67 Ibid 226 [17].
68 Ibid 227 [18].
69 See above n 5.
70 *Stanley* (n 1) 227 [18], quoting *Craig* (n 2) 179–80; *Kirk* (n 3) 572 [67] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
71 *Stanley* (n 1) 229–30 [26]–[33].

sentence would stand irrespective of whether an ICO was validly considered under the *CSP Act*. The second conclusion his Honour reached was that, properly understood, the decision to impose/refuse an ICO is *not* conditioned upon the valid consideration of section 66(2). Noting the availability of appeal to correct noncompliance with restrictions on power in any case,[72] his Honour addressed the language of sections 67, 68 and 69(3), each 'undoubtedly [limiting] the authority of a sentencing court to make an ICO'.[73] Exceeding these sections would take the sentencing court over into jurisdictional error.[74] Conversely, on his Honour's assessment, sections 66 and 69(1) do not have that quality.[75] Those sections only concern how a sentencing court's authority to make/not make an ICO under section 7(1) is to be exercised.[76] As section 66 requires a series of considerations to be accounted for, his Honour concluded in view of legislative intention – chiefly the section 5(4) provision preserving sentences of imprisonment from invalidity despite any failure to consider alternatives such as ICOs – that '[to] construe all as conditions of the authority … to make or refuse to make an ICO would be to treat every failure of the court to take account of a relevant consideration as amounting to jurisdictional error'.[77]

B Jagot J

Jagot J's judgment addressed both the statutory regime and the question of jurisdictional error in fine detail. Her Honour started from the ratio of Dixon J (as his Honour then was) in *Parisienne Basket Shoes Pty Ltd v Whyte* – that 'the clear distinction must be maintained between want of jurisdiction and the manner of its exercise'[78] – before observing:

> If the assessment required by s 66(2) is not a condition precedent to the imposition of a sentence of imprisonment, the assessment is nothing more than one evaluative step amongst many which the [*CSP Act*] requires to be carried out … in directing that the sentence of imprisonment be served other than by way of full-time detention … [failure to adhere to section 66(2)] would be no failure to observe an essential condition to the exercise of the sentencing power and no want of jurisdiction … [but instead] would be a wrong manner of exercise of a subsequent power within jurisdiction … amenable to correction on appeal if a right of appeal exists.[79]

This conclusion rested on several pillars. Chiefly, her Honour went into significant detail in analysing the surrounding sections of the *CSP Act*. Each of sections 5(1), 5(5), 62, 181 and 165 addressed the conclusion that the making of an ICO followed on from a sentence of imprisonment *as a matter of jurisdiction* and as such, unlike sections 67, 68 and 69(3) (each of which govern circumstances

72 Ibid 230 [36].
73 Ibid 231 [37]–[38].
74 Ibid.
75 Ibid [39].
76 Ibid.
77 Ibid 232 [43].
78 Ibid 258 [160], quoting *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369, 389 (Dixon J, Evatt J agreeing at 394 and McTiernan J agreeing at 394).
79 *Stanley* (n 1) 260 [170].

in which an ICO can/cannot be made), section 66 could not properly be described as a jurisdictional precondition to making an ICO.[80] Furthermore, her Honour cited the reasoning of Bell P (as the Chief Justice of New South Wales then was) as regards section 5(4) – a provision protecting sentences of imprisonment from certain jurisdictional errors – that it would be 'more than peculiar' if a defective section 66(2) assessment vitiated a sentence of imprisonment otherwise protected from jurisdictional error by section 5(4).[81] Her Honour relied also on the language of the relevant provisions, noting both the terms of section 7 (permitting that an ICO 'may' be ordered, but not mandating this),[82] the character of section 66(2) as part of a wider evaluative process,[83] and the balance of considerations provided in section 66 alongside community safety in support of the argument that ICO considerations formed a 'subsequent evaluative process' separate to an order for imprisonment, and thus not affecting that jurisdiction.[84] After stressing further the potential adverse consequences of jurisdictional error raised by Gageler J, her Honour turned lastly to the defects that Gordon, Edelman, Steward and Gleeson JJ identified in the sentencing Judge's reasoning.[85] Noting the pressures under which District Court Judges operate, and thus the constraints placed on their ability to give fulsome reasons,[86] her Honour did not agree that the sentencing Judge's statements failed to disclose adequate consideration of section 66(2).[87] Both the sentencing Judge's focus on the making of an ICO, and her explicit reference to the 'three step process' required by the statutory regime in weighing whether to make an ICO, were described as 'beyond doubt'.[88] Though her Honour noted the sentencing Judge's failure to expressly mention section 66,[89] she found that the sentencing Judge's 'very close consideration' of whether to make an ICO, references (if not directly) to applicable case law, and express description of community safety as 'of paramount consideration' were sufficient to discharge the function in section 66(2).[90] While accepting that the sentencing Judge '[had] not adequately discharged her obligation to give reasons', her Honour concluded by reiterating the untenability of the argument that the section 66(2) assessment had not been undertaken at all.[91]

80 Ibid 264 [191].
81 Ibid 265 [195].
82 Ibid [197].
83 Ibid 265–6 [198].
84 Ibid 265–7 [198]–[205].
85 Ibid 267–9 [206]–[211].
86 Ibid 270 [214].
87 Ibid 270–1 [216]–[219].
88 Ibid 271 [219].
89 Ibid 275 [237].
90 Ibid [238]–[239].
91 Ibid [241].

V SIGNIFICANCE

A Vis-à-vis the Authorities in *Craig* and *Kirk*

Findings of jurisdictional error by inferior courts are comparatively rare,[92] due to their wider jurisdiction (and, it follows, greater scope for errors within jurisdiction) as against tribunals and other administrative decision-makers.[93] *Stanley* did not disturb the authorities in *Craig* and *Kirk* – indeed, all of the judgments iterated their congruence with them.[94] Kiefel CJ, Gageler J and Jagot J each took the view that section 66 constituted an evaluative process *within* the section 7(1) power to make an ICO – itself distinct from the power to order imprisonment.[95] On that view, the sentencing court is empowered to make an ICO, and in so doing must consider the matters provided in section 66. As such, non-compliance with section 66(2) was an error of law made within the jurisdiction to make an ICO, and thus an error of law which the sentencing court had the jurisdiction to make. Gordon, Edelman, Steward and Gleeson JJ agreed that the power to order imprisonment and the power to make an ICO were separate.[96] Where the discretion to consider an ICO was properly enlivened, however, they construed section 66 as a restraint on the power to make an ICO.[97] On that view, failure to properly consider the matters set out in subsections (1)–(2) – community safety, viewed through the lens of risk of reoffending – took the sentencing Judge beyond the limits of the power by 'ignoring entirely the paramount consideration for imposing an ICO' required by those subsections.[98] It was therefore an error which went beyond the jurisdiction of the sentencing court.

Stanley does not therefore extend the three examples of jurisdictional error to which *Craig*/*Kirk* established courts might succumb.[99] Indeed, the majority judgment indicated that it was 'not necessary' to go beyond the categories of error established by those authorities.[100] The sentencing Judge had '[misapprehended] or [disregarded] the nature or limits of [their] functions' created by section 66 under section 7(1) (that is, the second type of error identified in *Craig*) and disregarded section 66 in circumstances where the statute conferring their jurisdiction required that that matter be taken into account as a pre-condition of the section 7(1) authority to make an order (that is, the third type identified in *Craig*).[101] Rather, *Stanley* can be seen to have redrawn the outer boundary of inferior court

92 See above n 6.
93 See especially *Craig* (n 2) 176–7, 179–80 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).
94 *Stanley* (n 1) 227 [18] (Gageler J), 236 [57] (Gordon, Edelman, Steward and Gleeson JJ), 258–9 [161]–[166] (Jagot J).
95 Ibid 225 [10]–[13] (Kiefel CJ), 230 [32]–[33], 231 [39]–[40] (Gageler J), 264 [190]–[191] (Jagot J).
96 Ibid 242 [82] (Gordon, Edelman, Steward and Gleeson JJ).
97 Ibid.
98 Ibid 246 [100].
99 See *Kirk* (n 3) 574 [73] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
100 *Stanley* (n 1) 236 [57] (Gordon, Edelman, Steward and Gleeson JJ). Their Honours iterated in that paragraph, however, that '[t]he circumstances in which an inferior court may fall into jurisdictional error are not closed'.
101 Ibid, quoting and paraphrasing *Craig* (n 2) 177 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

jurisdictional error – albeit, at least at present, only in the specific context of the *CSP Act* in New South Wales – reasserting the primacy of express legislative intent and diminishing the extent to which Judges will be spared jurisdictional error for transgressing thereupon. Parliament's omission of saving provisions in setting out discretionary powers such as those in the *CSP Act* is to be read as deliberate.[102] Being mostly limited to its factual circumstances – especially considering that the case turned partly on the absence of saving provisions vis-à-vis section 66[103] – *Stanley* has ready application for inferior court sentencing in New South Wales under the ICO regime, and the nature of the reasoning process required by sentencing Judges there.

B For Sentencing Judges

Certainly, the most significant effect of the High Court's reasoning in *Stanley* is to recalibrate the manner in which sentencing decisions are handed down in lower courts of New South Wales.[104] Indeed, shortly after *Stanley* was delivered,[105] the Court of Criminal Appeal in *Zheng v The King* ('*Zheng*') distilled five key points for sentencing Judges:[106]

> First, the power to make an ICO requires an evaluative exercise that treats community safety as the paramount consideration, with the benefit of the assessment mandated by s 66(2). The issue is not merely the offender's risk of reoffending, but the narrower risk of reoffending in a manner that may affect community safety.
>
> Second, s 66(2) is premised upon the view that an offender's risk of reoffending may be different depending upon how their sentence of imprisonment is served, and implicitly rejects any assumption that full-time detention of the offender will most effectively promote community safety.
>
> Third, the nature and content of the conditions that might be imposed by an ICO will be important in measuring the risk of reoffending.
>
> Fourth, the consideration of community safety required by s 66(2) is to be undertaken in a forward-looking manner having regard to the offender's risk of reoffending.
>
> Fifth, while community safety is not the sole consideration in the decision to make, or refuse to make, an ICO, it will usually have a decisive effect unless the evidence is inconclusive.

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102 Bell P expressly rejected this conclusion in the Court of Appeal's judgment: *Stanley* (NSWCA) (n 9) 14–15 [54]–[57], citing there his judgment in *Australian Rail Track Corporation Ltd v Dollisson* [2020] NSWCA 58, [47]. Edelman J remarked on the *expressio unius* issue during the special leave application – *Stanley* (Special Leave Application) (n 18) 63–4 – but this was not addressed in those terms by Gordon, Edelman, Steward and Gleeson JJ: *Stanley* (n 1) 244–5 [89]–[95].

103 Especially where other sections (such as sections 5(1) and 45(4)) are spared jurisdictional error for non-compliance. See, on other sections with deliberate saving provisions, Gordon, Edelman, Steward and Gleeson JJ's discussion in *Stanley* (n 1) 244–5 [89]–[95].

104 See recently, to this end, *R v Esho* [2023] NSWDC 195, [45]–[51] (Newlinds SC DCJ); *R v Saleh; R v Salim* [2023] NSWLC 2, [59]–[81] (Donnelly LCM); *R v Sahgal* [2023] NSWDC 127, [90]–[95] (Montgomery DCJ); *R v Collins* [2023] NSWDC 258, [58]–[63] (Haesler SC DCJ); *R v Gagnuss* [2023] NSWDC 265, [38]–[68] (Haesler SC DCJ); *R v Lee* [2023] NSWDC 420, [45]–[64] (Lerve DCJ) ('*Lee*').

105 *Stanley* was handed down on 15 February 2023, with *Zheng* following on 22 March 2023, having originally been heard in mid-2022.

106 [2023] NSWCCA 64, [282]–[286] (Gleeson JA, Hamill J agreeing at [305] and Ierace J agreeing at [306]) (citations omitted) ('*Zheng*').

The High Court has, to this end, departed somewhat from earlier authorities such as *R v Hamieh* as regards the reasoning required of lower courts in sentencing.[107] From an earlier position of accepting comparatively brief remarks from busy lower court Judges – while still requiring them to adequately address submissions put, and to give reasons by reference to applicable law – *Stanley* has moved towards requiring more fulsome, specific reasoning. In particular (as regards the ICO regime), it will be insufficient for Judges to refer in general terms to the requirements of section 66, or to speak overly generally as to the applicable cases in exercising that discretion. The balancing of community safety *going forward*, as the paramount consideration, alongside the anticipated effect of an ICO/custodial sentence on the likelihood of recidivism, must be clearly demonstrated. The conditions of any potential ICO must be clearly connected with appraisals of the offender's risk of reoffending, with the circumstances of their offending, and with community safety looking ahead. It will therefore be important for sentencing reasoning to clearly consider and account for these factors. Since *Zheng*, the Court of Criminal Appeal has had cause to consider *Stanley* in detail on three further occasions.[108] The first, *Tonga v The King* ('*Tonga*'), concerned a sentence delivered prior to the High Court's February judgment,[109] with the Court of Criminal Appeal holding that Buscombe DCJ had not erred in declining to order that a defendant charged with recklessly causing grievous bodily harm serve their sentence by ICO.[110] His Honour undertook the analysis required by section 66(2) and, although answering the question of whether a sentence of full time detention would more likely address the offender's risk of reoffending neutrally, had not fallen into error because matters beyond section 66(2) – such as general deterrence and the degree of violence involved in the offence[111] – were apt for consideration in the context of community safety.[112] In *R v FF*, a custodial sentence originally ordered to be served by ICO was overturned on manifest inadequacy grounds,[113] with Beech-Jones CJ at CL (Fagan J and Hulme JA agreeing) there hinting at the notion (but not deciding)[114] that the majority reasoning in *Stanley* potentially

107 [2010] NSWCCA 189. See also the other cases cited by Jagot J in *Stanley* (n 1) 269 [213] n 168, namely *R v Speechley* (2012) 221 A Crim R 175; *Maxwell v The Queen* [2020] NSWCCA 94; *You v The Queen* [2020] NSWCCA 71.

108 As at the date of publication. The Court of Criminal Appeal has, of course, cited *Stanley* on more than two occasions – see, eg, *Carl v The King* [2023] NSWCCA 190, [109]–[114] (Yehia J, Leeming JA agreeing at [6] and Weinstein J agreeing at [115]); *Homewood v The King* [2023] NSWCCA 159, [3]–[7] (Beech-Jones CJ at CL); [58]–[62] (Ierace J) – albeit each of those went into less detailed consideration than *Tonga v The King* [2023] NSWCCA 120 ('*Tonga*'), *R v FF* [2023] NSWCCA 186 ('*R v FF*') and *Chan v The King* [2023] NSWCCA 206 ('*Chan*').

109 *R v Tonga* (District Court of New South Wales, Buscombe DCJ, 14 November 2022) ('*Tonga* (NSWDC)').

110 *Tonga* (n 108) [51]–[53] (Basten AJA, Walton J agreeing at [54] and Hamill J agreeing at [58]). See at [23]–[50] (Basten AJA, Walton J agreeing at [54] and Hamill J agreeing at [58]) for the Court of Criminal Appeal's consideration of *Stanley*.

111 Ibid at [38], quoting *Tonga* (NSWDC) (n 109).

112 *Tonga* (n 108) [47]–[50] (Basten AJA, Walton J agreeing at [54] and Hamill J agreeing at [58]). See also [55]–[57] (Walton J); [60]–[62] (Hamill J).

113 *R v FF* (n 108) [5] (Beech-Jones CJ at CL, Fagan J agreeing at [89] and Hulme AJ agreeing at [90]).

114 Ibid [58].

'precludes, or at least affects, a contention that a sentence is manifestly inadequate simply because it involves the sentence being served by way of an ICO as opposed to full-time custody'.[115] Most recently, N Adams J expressed support for this view, again without deciding the question, in *Chan v The King*.[116] That case concerned an appeal against *ex tempore* sentencing reasons given in the District Court pre-*Stanley*,[117] with her Honour (Kirk JA and Rothman J agreeing) holding that Bright DCJ – having been required to consider an ICO in the circumstances – had misdirected herself as to the applicable sentencing legislation in the ICO context[118] and failed both to consider rehabilitation at all under section 66(3),[119] and to sufficiently iterate the paramountcy of community safety with express reference to section 66(1) in the course of sentencing.[120] On these bases, the Court of Criminal Appeal quashed the original aggregate sentence,[121] ordering instead an eight-month sentence to be served by ICO.[122] Each of these decisions reinforces the import of the explicit and deliberate calculus undertaken by sentencing Judges that *Stanley* iterated.[123]

C For Practitioners and Self-Represented Defendants

Though *Stanley* gives much in the way of guidance for sentencing Judges, it has equally real and direct consequences for practitioners and self-represented defendants. For those representing persons in sentencing hearings, *Stanley* indicates that the discretionary power to make/not make an ICO will properly be enlivened where it is validly raised. Practitioners should thus, of course, be alive to their clients' eligibility for an ICO under sections 67–8 of the *CSP Act*.[124] Once

115 Ibid [57].

116 *Chan* (n 108) [149]–[150].

117 *R v Chan* (District Court of New South Wales, Bright DCJ, 10 November 2022). See Rothman J's observations on the construction of sentencing remarks: *Chan* (n 108) [16].

118 Bright DCJ, dealing with an offence under the federal *National Health Act 1953* (Cth), had errantly considered the provisions under section 16A of the *Crimes Act 1914* (Cth) in determining the applicability of an ICO, and not the provisions of section 3A of the *CSP Act*, as section 66(3) of the *CSP Act* in fact required: *Chan* (n 108) [98]–[117] (N Adams J); [4]–[8] (Kirk JA).

119 *Chan* (n 108) [113]–[116] (N Adams J).

120 Ibid [126]–[148] (N Adams J, Kirk JA agreeing at [1] and Rothman J agreeing at [11]). See also the additional remarks of Rothman J at [20]–[23].

121 Mr Chan was originally sentenced to an aggregate sentence of two years for breaches of section 103(5)(g) of the *National Health Act 1953* (Cth), to be released on a Recognizance Release Order after serving 14 months per section 20(1)(b) of the *Crimes Act 1914* (Cth): see *Chan* (n 108) [25] (N Adams J, Kirk JA agreeing at [1] and Rothman J agreeing at [11]).

122 *Chan* (n 108) [166] (N Adams J, Kirk JA agreeing at [1] and Rothman J agreeing at [11]).

123 *Tonga* (n 108), in particular, reiterates that section 66(2) is not necessarily the decisive factor in deciding whether or not to impose an ICO, so long as the three-step process is undertaken. In fact, a finding that a sentence of imprisonment *would* better reduce the risk of reoffending in light of community safety would not necessarily preclude the sentencing Judge from imposing an ICO. Whether or not a finding that an ICO would better address the offender's risk of reoffending would preclude the valid imposition of a full-time custodial sentence is beyond the scope of this case note: see *Tonga* (n 108) [41] (Basten AJA, Walton J agreeing at [54] and Hamill J agreeing at [58]), citing *Stanley* (n 1) and *Mandranis v The Queen* (2021) 289 A Crim R 260.

124 See, eg, *Lowe v The King* [2023] NSWCCA 169, [93] (Ward P, Walton J agreeing at [107] and Ierace J agreeing at [108]). See also the *obiter* remarks of Lerve DCJ in *Lee* (n 104) at [48]: 'To my observation, since the High Court handed down the reasons in [*Stanley*] that a sentence be served by ICO has become

raised, both prosecution and defence counsel should make targeted submissions going to the interaction between subsections 66(1) and 66(2), as it relates to the defendant in the whole of their circumstances – that is, their ongoing risk to community safety as regards their risk of reoffending. The joint judgment noted the factual scenario of the crime (where the guns in question had been seized, thus posing no ongoing threat),[125] the circumstances in which that crime occurred (that is, that Ms Stanley was no 'dedicated gun runner'),[126] and the defendant's personal circumstances (chiefly that she was neither likely nor able to repeat such an offence, and thus posed no ongoing community risk) to indicate that an ICO may have been appropriate had that sentencing exercise been properly conducted in Ms Stanley's case.[127] The issue is complicated for self-represented defendants who, having pleaded guilty to an offence, may not be aware of their eligibility for an ICO in order to raise it at sentencing. Similarly, where an ICO is declined in circumstances where proper attention has not been given to subsections 66(1) and 66(2), as in *Stanley*, self-represented defendants are unlikely to be aware of the potential jurisdictional error involved. Both concerns were directly adverted to by Basten JA in his concurring Court of Appeal judgment,[128] although neither is a specific consequence of *Stanley* so much as a further complexity with which already overwhelmed self-represented defendants are likely to have to grapple. In any event, it may fall to sentencing Judges themselves to raise with an unrepresented defendant, where appropriate, the availability to the court of an ICO if the defendant wishes to make submissions on the suitability of that course in their circumstances.

VI CONCLUSIONS

The High Court's *Stanley* decision does not, on its face, extend or add to those circumstances in which *Craig* and *Kirk* identified that jurisdictional error by courts commonly arise.[129] Indeed, Gordon, Edelman, Steward and Gleeson JJ ascribed the sentencing Judge's error to the second and third instances of error described there.[130] *Stanley* is nonetheless significant, reversing such as it does successive Court of Appeal authorities on inferior court jurisdictional error,[131] and reframing

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the default submission in virtually all cases where a sentence of imprisonment of two years or less is under consideration'.

125 *Stanley* (n 1) 249 [114] (Gordon, Edelman, Steward and Gleeson JJ).

126 Ibid 250 [116].

127 Ibid 249–50 [113]–[117].

128 *Stanley* (NSWCA) (n 9) 34 [135].

129 The High Court has resisted bright-line categorisation of jurisdictional error, describing attempts 'to mark the metes and bounds' of it as 'neither necessary, nor possible': see *Kirk* (n 3) 573 [71] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

130 *Stanley* (n 1) 236 [57] (Gordon, Edelman, Steward and Gleeson JJ).

131 *Stanley* (NSWCA) (n 9); *Quinn* (n 10). Although McCallum JA held that 'the failure to engage with the necessary tasks of first assessing the objective seriousness of the offence as an aspect of the task of determining the appropriate sentence before turning to the task required by s 66' was jurisdictional in *Wany* (n 10) (at 636 [70], Simpson AJA agreeing at 637 [72], Meagher JA not deciding) and later in her

the sentencing exercise conducted regularly by inferior courts across New South Wales under the ICO regime in favour of a more legalistic approach. Thus, where a sentence of imprisonment is ordered and thereafter the power to make/not make an ICO is properly enlivened, failure to consider (as paramount) community safety going forward by reference to an offender's risk of reoffending will vitiate that exercise.[132] To this end, *Stanley* places a greater emphasis on courts adequately considering statutory requirements when exercising discretionary powers (in the absence of saving provisions). The case has immediate consequences for sentencing Judges in New South Wales – as the Court of Criminal Appeal recognised in *Zheng*[133] – both in how they approach the ICO-making process and in the giving of reasons to that end. It also has necessary import for practitioners, both in prosecution and defence, who must be alive to these considerations in raising the availability of an ICO and in making submissions on the suitability of such an order where that prospect arises.

Honour's dissenting judgment in *Stanley* (NSWCA) (n 9) (at 44–5 [178]–[182]), Gordon, Edelman, Steward and Gleeson JJ did not follow or otherwise advert to her Honour's reasoning in their joint judgment.

132 See, eg, *Chan* (n 108).

133 *Zheng* (n 106) [280]–[286] (Gleeson JA, Hamill J agreeing at [305] and Ierace J agreeing at [306]). See also *R v FF* (n 108) [57] (Beech-Jones CJ at CL, Fagan J agreeing at [89] and Hulme AJ agreeing at [90]).