NSW GOVERNMENT Justice Sentencing Council

Sentencing trends and practices

Annual Report 2016

NSW Sentencing Council

July 2017

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The Council's projects (Chapter 1)

0.1 We worked on two projects in 2016:

- **domestic violence sentencing:** reference received July 2015; report transmitted 18 February 2016, and
- **intensive correction orders:** statutory review under s 73A of the *Crimes (Sentencing Procedure) Act 1999* (NSW); report transmitted 20 September 2016.

Sentencing related research (Chapter 2)

0.2 Sentencing related research conducted by the NSW Bureau of Crime Statistics and Research in 2016 included:

- Why is the NSW prison population still growing? Another look at prison trends between 2011 and 2015 - Bureau Brief No 113 (January 2016).
- What's causing the growth in Indigenous Imprisonment in NSW? - Bureau Brief No 118 (August 2016).
- Participation in PCYC Young Offender programs and re-offending - Crime and Justice Bulletin No 191 (May 2016).
- The NSW Intensive Drug and Alcohol Treatment Program (IDATP) and recidivism: An early look at outcomes for referrals - Crime and Justice Bulletin No 192 (July 2016).
- Does the Custody-based Intensive Treatment (CUBIT) program for sex offenders reduce re-offending? Crime and Justice Bulletin No 193 (July 2016).
- Parole release authority and re-offending - Crime and Justice Bulletin No 194 (July 2016).
- Willingness to pay a fine - Crime and Justice Bulletin No 195 (August 2016).
- Trends in conditional discharges in NSW Local Courts: 2004-2015 - Crime and Justice Bulletin No 196 (August 2016).
- The revised Group Risk Assessment Model (GRAM 2): Assessing risk of reoffending among adults given non-custodial sanctions - Crime and Justice Bulletin No 197 (August 2016).

Operation of guideline judgments (Chapter 3)

0.3 The six guideline judgments were cited or considered by the higher courts in 84 matters.

Cases of interest (Chapter 4)

0.4 In 2016, the appellate courts delivered judgments of interest on the following sentencing topics:

- Use of fresh evidence in severity appeals - *Betts v The Queen* [2016] HCA 25.
- Sentencing the "worst category" of offence - *R v Kilic* [2016] HCA 48.
- Sentencing for historic juvenile offences - *TC v R* [2016] NSWCCA 3.
- Taking general deterrence into account when sentencing domestic violence offences - *Efthimiadis v R* (No 2) [2016] NSWCCA 9.
- The relationship between indicative sentences and aggregate sentences - *Dimian v R* [2016] NSWCCA 223.
- Sentencing offenders who are already serving sentences - *Dimian v R* [2016] NSWCCA 223.
- Resentencing an offender who has been bailed pending an appeal after a period of pre-sentence custody - *Walker v R* [2016] NSWCCA 224.
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- Resentencing after the offender fails to fulfil an undertaking to assist authorities - *R v X* [2016] NSWCCA 265, and *R v MG* [2016] NSWCCA 304.
- Sentencing where the offence was committed in the victim's home - *Jonson v R* [2016] NSWCCA 286 and *R v Lulham* [2016] NSWCCA 287.
- Taking into account the harm caused by media coverage - *R v Curtis [No 3]* [2016] NSWSC 866; *R v Wran* [2016] NSWSC 1015; *R v Obeid (No 12)* [2016] NSWSC 1815.

Review of intensive correction orders (Chapter 5)

0.5 Since 2011 there has been moderate growth each year in the number of offenders sentenced to an intensive correction order ("ICO"). In 2016:

- 1906 offenders were sentenced to ICOs
- 1.2% of all NSW offenders were sentenced to an ICO for their principal offence.

As a proportion of penalties imposed, ICOs are imposed most frequently in major cities and least frequently in very remote regions.

0.6 Patterns of operation do not appear to have changed significantly over the last year. Minor trends observed in 2016 include:

- increases in the percentages of ICOs imposed as a proportion of all penalties in Inner Regional Australia, Outer Regional Australia and Remote Australia
- a resumption in the upward trend of ICOs issued for Indigenous offenders

- a decrease in the proportion of ICOs imposed for traffic and vehicle regulatory offences and increases in the proportion of ICOs imposed for illicit drug offences and for acts intended to cause injury, and
- a decrease in the proportion of ICOs successfully completed and an increase in the proportion of ICOs revoked.

Functions and membership of the Council (Chapter 6)

0.7 The Council continues to carry out its statutory functions. Council meetings are scheduled on a monthly basis with business being completed at these meetings and out of session.

0.8 We welcome the following new members appointed in 2016: Paul McKnight, Felicity Graham, Thea Deakin-Greenwood, and Christina Choi.

0.9 We acknowledge with thanks members whose term expired in 2016: Nicholas Cowdery AM QC, Ken Marslew AM, and the Hon Anthony Whealy QC.

0.10 We have maintained close working relationships with the Bureau of Crime Statistics and Research, and other parts of the Department of Justice, including: the State Parole Authority; Corrective Services NSW – Sentence Administration; and the NSW Police Force.

0.11 The NSW Parliament implemented the recommendation at page 49 of our 2010 Report: *An Examination of Sentencing Powers of the Local Court in NSW in the Criminal Procedure Amendment (Summary Proceedings for Indictable Offences) Act 2016 (NSW)*.

0.12 The staff of the Law Reform and Sentencing Council Secretariat (a division of the Strategy and Policy Branch of the Department of Justice) support the work of the Council.

1. The Council's projects

In brief

We worked on two projects in 2016:

- domestic violence sentencing
- intensive correction orders.

We also released reports on both projects.

Domestic violence sentencing

1.1 We transmitted this report on 18 February 2016. It responded to terms of reference received from the NSW Attorney General on 7 August 2015 requiring us to analyse sentencing for domestic violence ("DV") offences.

1.2 The terms of reference asked us to undertake an analysis of sentencing for DV offences to:

- Consider the principles the Courts apply when sentencing domestic violence offences (as defined by the *Crimes (Domestic and Personal Violence) Act 2007* - "Domestic Violence Offences") and advise on how those principles are applied by the Courts
- Compare sentences imposed and sentences actually served for Domestic Violence Offences with those imposed for the same personal violence offences (not classified as Domestic Violence Offences) for key offence types where the Council considers undertaking a comparison may demonstrate sentencing patterns between the two categories of offences
- Compare the available sentences, sentencing outcomes and sentences served for the NSW offence of contravening an [Apprehended Domestic Violence Order (ADVO)] (s 14 *Crimes (Domestic and Personal Violence) Act 2007*) with the comparable offences in other Australian jurisdictions and
- Compare the reoffending rates for people convicted of Domestic Violence Offences with the reoffending rates for the same personal violence offences (not classified as Domestic Violence Offences) for key offence types where a comparison is possible and the Council considers comparison may demonstrate difference between the two categories of offences.

Considerations at sentencing

1.3 We identified the principles that the courts use in sentencing DV offences, as stated by the appeal courts. In our view the appeal courts' statements about the sentencing of DV offenders are strong and generally appropriate.

1.4 In addition to the general approach of treating DV seriously, we identified a number of other principles and considerations that the courts take into account.

1.5 With regards to the purposes of sentencing, the courts have emphasised the weight to be given to deterring the offender from further offending (specific deterrence) and to deterring others from committing similar offences (general deterrence). The courts have also referred to protection of the community, recognition of the harm done to the victim and the community, and denunciation of the offending behaviour as purposes that may be given weight when sentencing DV offences.

1.6 Aggravating factors that may be relevant to sentencing DV cases include:

- the offender is a repeat DV offender (recidivism)
- the offender has abused power and control
- the offender has breached conditional liberty or an apprehended domestic violence order
- the offence took place in the victim's home, and
- the offence took place in the presence of a child.

1.7 Circumstances that the courts have held do not mitigate domestic violence offences include:

- the fact that there is an existing or prior relationship between the offender and the victim
- the offender's distress at the breakdown of a relationship
- provocative conduct, and
- the attitude of the victim to the offender at sentencing.

1.8 The courts have, however, recognised that there are some strictly limited circumstances where some mitigation may be possible:

- where the offender witnessed or was subject to DV during childhood
- where provocation from the victim amounts to DV, and
- where consequences for third parties (such as other dependent family members) are taken into account.

1.9 We noted the work of the Sentencing Guidelines Council of England and Wales on DV and also the work being undertaken on a national bench book on family violence following recommendations from the Australian and NSW Law Reform Commissions. We strongly supported the development of guidelines for sentencing DV offences either in the form of bench book directions or through a guideline judgment to help the courts develop and apply relevant principles.

Comparing DV and non-DV offences

1.10 We compared DV and non-DV offenders for the offences of common assault, assault occasioning actual bodily harm, destroy or damage property (valued at $2,000 or less), contravene AVO and stalk or intimidate, with respect to the following:

- charges and charge outcomes
- sentences imposed for the principal offence
- sentences actually served, and
- reoffending.

1.11 As the terms of reference requested, we identified trends based on a simple comparison between DV and non-DV offenders. Our general view is that there is nothing in the data that identifies a problem with the sentencing of DV offenders. We are supported in this view by the NSW Bureau of Crime Statistics and Research's ("BOCSAR") recently published study of sentencing outcomes for serious DV and non-DV assault which adjusts sentencing trends for the factors that are known to influence sentencing outcomes. BOCSAR's general conclusion was that there was no evidence that the Local Court sentences serious non-DV assault matters more harshly than serious DV assault matters, once the factors that are known to influence sentencing outcomes are taken into account.

1.12 The data on offender characteristics shows some differences between offences and between the DV and non-DV versions of those offences, which may explain some of the different sentencing outcomes. These characteristics include age, prior criminal record and plea. Some further work may be required to adjust the data for variables known to impact on outcomes, to account for relevant differences between DV and non-DV offending and DV and non-DV offenders.

1.13 Based on the trends identified, we made the following observations:

- In relation to the number of charges laid – we noted the recent initiatives to address the relatively high withdrawal rate for DV charges, encourage proactive policing, provide support and assistance to victims and to improve the court process. We identified a need to monitor the effectiveness of these initiatives in assisting DV charges to proceed, including the willingness of the courts to convict an offender in the absence of evidence from the victim.
- In relation to the sentences imposed – we identified a need to investigate the general trends identified in the case of the less serious offences of common assault and destroy or damage property, to account for variables that are known to impact on sentencing and to investigate the effectiveness of the various good behaviour bonds imposed.
- In relation to reoffending – we identified a need to investigate the relatively high reoffending rates of offenders who have contravened apprehended domestic violence orders ("ADVOs") with a view to developing appropriate responses or sentences that will deal with the causes of offending behaviour and the criminogenic needs of offenders.
- We also identified a need to monitor the availability and effectiveness of DV programs both in prison and in the community (either as part of parole or as part of a non-custodial sentence).

Contravening orders in NSW and other jurisdictions

1.14 Finally, we compared the data for contravening an ADVO and breaches of similar orders in other jurisdictions. Subject to further investigation, in particular to control for differences between the jurisdictions, we consider it could be worth investigating the impact of increased penalties for second and subsequent offences (referred to as "escalated penalties") where offenders contravene apprehended violence orders on second and subsequent occasions.

Intensive correction orders

1.15 On 20 September 2016, we transmitted a report to the Attorney General reviewing the intensive correction order ("ICO") provisions contained in Part 5 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and Part 3 of the *Crimes (Administration of Sentences) Act 1999* (NSW). The review was required by s 73A of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

1.16 Since the provisions commenced on 1 October 2010, the NSW Law Reform Commission ("LRC") has carried out a review of sentencing law in NSW and recommended, in Report 139 (2013), that the ICO provisions be replaced or amended. At our reporting date, the Government was considering these recommendations.

1.17 ICOs were introduced at the same time that periodic detention was abolished, and sought to address some of the shortcomings of periodic detention as a penalty - in particular the lack of availability of periodic detention in all regions of the State and the fact that detainees were not effectively case managed or rehabilitated. The LRC identified that the ICO helps to reduce reoffending, reduce costs, and keep offenders out of prison. Submissions to this review also generally supported ICOs as a community-based alternative to custodial sentences.

1.18 However, the LRC found that ICOs were underused and not targeted to those offenders who might benefit most. In particular:

- there have been difficulties in making ICOs available across the State
- a large proportion of those who have received ICOs have been offenders with a low risk of reoffending who have needed little in the way of support or supervision
- some offenders who could benefit from the support and supervision offered by ICOs have been excluded, and
- stakeholders were dissatisfied about the unnecessary delay arising from the need for separate suitability assessments to be made for ICOs and home detention.

1.19 The LRC identified the mandatory community service work requirement as the "key barrier to ICO suitability" for offenders who have a cognitive impairment, mental illness, substance dependency, homelessness or unstable housing.

1.20 Submissions to this review generally agreed that ICOs were underused and not appropriately targeted.

1.21 We agree with the LRC's assessment of the problems with ICOs that need to be addressed, including their limited availability. This is borne out by the statistics and trends identified in Chapter 2 of our report.

1.22 The LRC's preferred option was for suspended sentences, home detention orders and ICOs to be replaced with a new community detention order ("CDO").

1.23 However, in the interim, in order to increase the number of offenders who could be sentenced to an ICO, the LRC recommended amendments to the existing ICO provisions that aimed to:

- reduce the number of offences that exclude an offender from an ICO
- extend the maximum period of an ICO to 3 years (and permit setting a non-parole period for an ICO)
- require the court to set the head sentence for the term of imprisonment first, before requesting a single suitability assessment for an ICO or home detention or both, and
- enlarge the scope of the activities that can satisfy the community service work component of an ICO, including engaging in literacy and numeracy courses, and work-ready, educational or other programs and, where appropriate, deferring commencement of the work to complete a residential drug or alcohol treatment program.

1.24 A number of submissions to this review expressly supported each of these recommendations. On the other hand, one submission expressly opposed altering the community service work component. No other submissions expressly opposed any of the LRC's other recommendations.

1.25 In light of the Government's ongoing consideration of the LRC's recommendations, we saw no need at this stage to put forward further recommendations to amend the existing provisions. This is especially so, since any implementation will inevitably involve some departure from the precise terms of the LRC's recommendations.

2. Sentencing related research

In brief

This Chapter summarises sentencing related research conducted by the Bureau of Crime Statistics and Research.

Why is the NSW prison population still growing? Another look at prison trends between 2011 and 2015

Bureau of Crime Statistics and Research, Bureau Brief No 113 (January 2016)

2.1 Between June 2011 and September 2015, the NSW adult prison population grew from 10,000 to 11,801 – an increase of 18%. The NSW Bureau of Crime Statistics and Research ("BOCSAR") examined the factors that are driving this upward trend both in the number of people held on remand (in custody pending trial or sentencing) as well as in the sentenced prisoner population.

2.2 The study found that the increase in remand numbers was more substantial than the increase in sentenced prisoner numbers – 32% as opposed to 9%. Growth in the number of people on remand was likely due to four factors:

- an increase in the number of people charged with offences where bail refusal is likely
- an increase in the number of people remanded for breaching their bail
- an increase in the amount of time people spent in custody on remand, possibly due to the trial backlog in the NSW District Court, and
- a (possibly) greater chance of bail refusal.

2.3 The increase in the sentenced prisoner population was solely due to an increase in the number of people sentenced to imprisonment and not due to an increase in non-

parole periods, longer sentences, or parole refusal. BOCSAR concluded that the increase in the number of people sentenced to imprisonment is due to two factors:

- police charging more people with types of offences that are likely to result in a prison sentence, including intimidation/stalking and breach of apprehended violence order, and
- the percentage of offenders given a prison sentence for a range of offences has risen, which suggests harsher sentencing practice.

2.4 BOCSAR concluded that the increase in the prison population is the result of changes in the way courts responded to suspected or convicted offenders as well as an increase in the number of people charged with serious offences.

What's causing the growth in Indigenous imprisonment in NSW

Bureau of Crime Statistics and Research, Bureau Brief No 113 (August 2016)

2.5 The number of Indigenous Australians incarcerated in NSW prisons more than doubled between 2001 and 2016. The rate of Indigenous imprisonment increased by 40% in NSW compared to a 10% increase in the rate of non-Indigenous imprisonment. A rise in the rate of Indigenous imprisonment was also recorded in other states, with the Northern Territory having the highest percentage increase (171.1%), followed by the ACT (141.0%), Victoria (112.6%) and South Australia (84.4%).

2.6 The number of Indigenous prisoners in every offence category grew between 2001 and 2015, but the highest growth in prisoner numbers was for acts intended to cause injury and justice procedure offences. There have also been increases in public order offences, dangerous or negligent acts endangering persons, illicit drug offences, unlawful entry with intent/burglary, and break and enter.

2.7 Justice procedure offences include breach of custodial orders (escape custody, breach of home detention order, breach of suspended sentence), breach of community-based orders (eg, bond with supervision) and breach apprehended violence order offences.

2.8 There is no statistical evidence that longer sentences are being imposed, rather the number of Indigenous offenders sentenced to terms of imprisonment has increased. The study showed that the rate at which Indigenous offenders were imprisoned for all offence categories had increased since 2001. The Indigenous prison population would be significantly lower if Indigenous offenders had continued to be imprisoned at the 2001 rate.

2.9 The study put the increase in custodial sentences down to:

- courts being more willing to imprison convicted offenders, and
- a growth in the number of Indigenous offenders being convicted of offences that are likely to result in custodial sentences.

2.10 The number of Indigenous prisoners on remand grew by 238% between 2001 and 2015, indicating a higher rate of bail refusal. The most substantial growth in the number of offenders refused bail was for justice procedure offences and acts intended to cause injury. The study showed that, as with sentenced offenders, the

rate at which Indigenous people were being refused bail was higher than it was in 2001. The study suggested that had the rate of bail refusal remained at the 2001 rate, only 71 additional people would have been refused bail in 2015 as opposed to 531.

2.11 The study suggests that strategies aimed at reducing the number of Indigenous people arrested and imprisoned for serious assault and stalk/intimidate offences as well as justice procedure offences would have a substantial effect on Indigenous prisoner numbers.

Participation in PCYC Young Offender programs and reoffending

Bureau of Crime Statistics and Research, Crime and Justice Bulletin, No 191 (May 2016)

2.12 BOCSAR evaluated the effectiveness of the Police Citizens Youth Clubs' ("PCYC") Young Offender program on reducing rates of reoffending among young people aged between 10 and 16. The study showed that when compared to a demographically similar group of young people who did not participate in the program, the program had no effect in reducing reoffending rates. Rather the results showed reoffending rates were higher among young offenders who had completed the program.

2.13 The Young Offender program provides case management and individually tailored programs for young people with a history of reoffending. Participation in the program is for approximately 12 months. Case management involves working with the Department of Juvenile Justice, schools and local police.

2.14 The impact of the program on recidivism rates had not previously been evaluated. The study compared 1,468 young offenders referred to the PCYC program with young people who were potentially eligible for the program but were not referred to it. The two groups were matched in areas such as gender, age group, Indigenous status, and prior offending characteristics to minimise the differences between the two groups.

2.15 The study found that within 12 months of referral to a PCYC program, 64% of the referred group reoffended compared with 57% of those in the comparison group. The median number of days before the first re-offence was 197 days for the PCYC-referred group compared with 266 days for the comparison group. The PCYC group was also found to have more offences and reoffending days in the 12 months following referral.

2.16 The study concluded that while it was possible that young people in PCYC programs could be more exposed to delinquent peers, it was also possible that the findings could be attributed to selection bias which could not be accounted for in the study. While the comparison groups were seemingly equivalent, there may have been important differences between the groups.

2.17 The results did not justify a conclusion that the Young Offender program was ineffective. Rather, more research, using more refined techniques, is needed to better match the comparison groups and to better differentiate between Young Offender programs in different regions which may use different strategies and activities.

The NSW Intensive Drug and Alcohol Treatment Program (IDATP) and recidivism: an early look at outcomes for referrals

Bureau of Crime Statistics and Research, Crime and Justice Bulletin, No 192 (July 2016)

2.18 This study looked at whether referral to the Intensive Drug and Alcohol Treatment Program ("IDATP") had an effect on recidivism rates. The study sample included 1,285 offenders who were released from NSW custody on or after 1 January 2013.

2.19 IDATP was established in 2011 and is located within the John Moroney Correctional Centre. It is aimed at medium-to-high-risk male offenders with serious substance use problems. The program is an intensive 9-month behaviour-based intervention consisting of three stages: orientation, treatment and maintenance. The treatment stage lasts for 6 months and comprises individual and group therapy based on cognitive behavioural therapy techniques. Prisoners also experience vocational training and education. The maintenance phase lasts for two months and builds on the skills learnt in treatment.

2.20 There is a strong association between drug use and crime. Fifty per cent of offenders and prison inmates report that their offences were related to drug and/or alcohol use. Not only is substance abuse in the prison population a health issue, it is an important risk factor for recidivism and return to custody.

2.21 After comparing the two matched groups, the study found the rate of reoffending and return to custody was lower among the treatment group at 6 months and 12 months. However, the differences were not statistically significant due to problems with implementing the program, including infrastructure works at the prison which forced the program to be relocated and a consequent reduction in the number of places, restricted the pool of potentially eligible participants in the program and, as a consequence, the number of participants who could be followed up in the outcome evaluation.

2.22 Although reoffending rates were lower for the group that underwent treatment than for the matched group, there was no statistically significant difference in reoffending outcomes due to the small sample of IDATP participants.

2.23 BOSCAR says the study should be treated as a preliminary evaluation of the effectiveness of IDATP. The power to detect a treatment impact of IDATP will improve as the pool of eligible referrals increases and more offenders successfully engage with the program.

Does the Custody-based Intensive Treatment (CUBIT) program for sex offenders reduce reoffending?

Bureau of Crime Statistics and Research, Crime and Justice Bulletin, No 193 (July 2016)

2.24 This study looked at whether the Custody-based Intensive Treatment ("CUBIT") program for moderate- to high-risk sex offenders reduces reoffending. CUBIT has been in operation since 1999 and is the most intensive sex offender treatment program available in NSW prisons. CUBIT is targeted at inmates who have a moderate to high risk of recidivism and/or moderate to high treatment needs. The

study sample included 386 male offenders released from custody between 2000 and 2010 who were identified by custodial staff as suitable for participation in CUBIT.

2.25 There is a large international body of literature suggesting that sex offender treatment programs reduce reoffending. However, more rigorous studies have been inconclusive. This is due to the difficulty in controlling for unobservable selection effects, which could lead to biased outcomes.

2.26 Evaluating programs like CUBIT is difficult as there is no natural control group and participation in the program is voluntary. Due to incentives attached to completing custody-based treatment programs – for example attaining parole – observable characteristics such as age and criminal history may be insufficient to control for differences in the recidivism risk of sex offenders who complete the program prior to release and sex offenders who are released untreated. Most standard methods of estimating the impact of the program would yield biased results, which reflect the presence of unobservable selection effects. To combat this, BOSCAR evaluated the impact of the program on reoffending by using instrumental variables methods. These methods work by exploiting some factor that affects the likelihood with which an inmate will complete treatment, but which is otherwise unrelated to the inmate's re-offending risk (after conditioning on available observable characteristics).

2.27 The results of the study suggest that participating in and completing the CUBIT treatment reduces the 5-year general recidivism risk from 55% to 42% for the sample group as a whole. However, the study found no evidence that CUBIT reduces sexual or violent reoffending specifically. The study concluded that the CUBIT program possibly reduces general reoffending but does not work effectively to prevent sexual and violent crimes. It is also possible that CUBIT has a greater impact on offenders at lower risk of sexual or violent recidivism. However, BOCSAR acknowledges that the results may have been affected by the limitations of the statistical methods employed.

Parole release authority and re-offending

Bureau of Crime Statistics and Research, Crime and Justice Bulletin, No 194 (July 2016)

2.28 In NSW, both courts and the NSW State Parole Authority ("SPA") play a role in releasing offenders on parole. Offenders sentenced to three years imprisonment or less usually have their non-parole period and conditions of release fixed by the court. At the end of the non-parole period – barring any change in circumstances – the offender is released. For sentences greater than three years, the court specifies the non-parole period, but the date and conditions of release are determined by SPA. SPA may release an offender at the end of their non-parole period but it is not required to do so. SPA can take into account things such as an offender's behaviour while in custody.

2.29 This split system of parole release allows rates of recidivism following the different forms of parole release to be measured. Earlier studies have shown that SPA-ordered parolees are less likely to reoffend than court-ordered parolees. One possible explanation for this is that SPA-ordered parolees have an incentive to participate in programs designed to reduce the risk of reoffending. An offender can increase the likelihood of getting parole by showing SPA that they want to rehabilitate.

2.30 The BOCSAR study looked at a cohort of 2,128 offenders who served between 18 and 36 months in custody with a release date between 1 January 2009 and 31 December 2012. It matched two groups of offenders – court-ordered parolees and SPA-ordered parolees – and compared overall rates of reoffending as well as examining differences in reoffending between the two groups.

2.31 The results indicated that SPA parolees who served between 18 months and three years in custody were less likely to reoffend than court-ordered parolees. The study also showed that reoffending rates after parole supervision had finished were higher for the court-ordered parolees.

Willingness to pay a fine

Bureau of Crime Statistics and Research, Crime and Justice Bulletin, No 195 (August 2016)

2.32 Fines (whether imposed by a court after conviction, or imposed by penalty notice without conviction) are a widely used sanction in NSW, particularly for traffic offences. The level of late payment and non-payment of fines is quite high – for example, nearly 40% of penalty notices imposed in the 2014-2015 financial year for speeding were not paid before the penalty notice was due and nearly 22% were not paid before the penalty reminder notice was due. There has been minimal research into people's willingness to pay fines.

2.33 The BOCSAR study involved randomly contacting adults in NSW who had previously received a penalty notice for a parking or traffic offence, as well as inviting people to participate through two online surveys. Ultimately, 3,154 respondents were questioned, 70% of whom had previously been fined. The participants were asked for their responses to questions about their personal experience as well as to a hypothetical fact scenario. The fact scenario involved participants receiving penalties of either $254, $436 or $2,252 for three different offences of exceeding the legal speed limit.

2.34 The results showed that of the group that had been previously fined, more than 21% had not paid the fine on time, while 40% had considered not paying on time. Respondents who had previously considered not paying a fine were more likely to be male, younger, to know someone who had not paid a fine and got away with it, to have more prior speeding offences, and to have been fined more recently.

2.35 The responses to the fact scenario showed that more than 80% of people were likely or almost certain to pay a $254 penalty on time, while 69% were likely or almost certain to pay the $436 penalty, but only 31% would be likely or certain to pay the $2,252 penalty. The mode of detection – police radar or camera detection – was statistically insignificant to the responses.

2.36 The overall results showed that higher penalties increase the risk of fine default, particularly among the unemployed. The study concluded that there were reasons to doubt the assumption that higher fines have a stronger deterrent effect, and that a cost-benefit analysis of the system to determine the point at which the marginal costs of imposing higher penalties exceed the marginal benefits would be worthwhile. The second conclusion was that there may be value in exploring options for tailoring fines more closely to an offender's means. For example, a HECS-style fine payment system might provide a more efficient and equitable basis for imposing and collecting fines.

Trends in conditional discharges in NSW Local Courts: 2004-2015

Bureau of Crime Statistics and Research, Crime and Justice Bulletin, No 196 (August 2016)

2.37 Under s 10(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), a court can either:

- find a person guilty of an offence but dismiss the charge without recording a conviction (s 10(1)(a))
- discharge the offender on a good behaviour bond of up to two years (s 10(1)(b)), or
- direct the offender to participate in an intervention program (s 10(1)(c)).

2.38 In 2010, nearly 20% of offenders had charges dismissed under a s 10 order.

2.39 BOCSAR data suggests that the use of s 10(1)(b) conditional discharges, in particular, is increasing, rising from 10.4% in 2004 to 14.7% in 2015. The significant upward trend in the number of s 10 orders is cause for concern. If used excessively, this type of sanction could undermine confidence in the criminal justice system.

2.40 This study investigated the reasons behind the increased tendency of courts to make s 10(1)(b) orders in recent years. It looked at five different offence types – assault, drug, weapons, property damage, and traffic offences – that accounted for more than 80% of cases where a bond without conviction was given.

2.41 The results show that the rate of s 10(1)(b) bonds for the selected offences rose between January 2004 and September 2015 – from 15.2% to 23.6%. The largest increase was in the category of drug offences, which rose from 7.6% to 17.7%. Bonds without conviction rose more rapidly for possession/use drug offences.

2.42 The demographic variables showed that Indigenous and male offenders were less likely to receive a bond without conviction than other offenders and that older offenders were more likely than younger offenders to receive a bond. An increase in either prior or concurrent offences significantly decreased the odds of being conditionally discharged.

2.43 The rise in conditional discharges, particularly for drug offences, over the last 12 years was not due to changes in the profile of offenders and offences being dealt with in the Local Court. The study concluded that further research was needed to examine whether the features of drug offences – for example, substance type and/or quantity – have changed which could explain the more lenient sentencing. Increased policing of less serious drug offences may also have played a part.

2.44 The results also showed that the increase in conditional discharges coincided with a drop in the proportion of monetary fines imposed. The fact that the rise in conditional discharges coincided with a decrease in the rate of fines imposed suggests that courts may be concerned about the effect of fines on vulnerable and disadvantaged groups, particularly Indigenous people, with the potential for licence suspension or disqualification for non-payment of fines.

The revised Group Risk Assessment Model (GRAM 2): Assessing risk of reoffending among adults given non-custodial sanctions

Bureau of Crime Statistics and Research, Crime and Justice Bulletin, No 197 (August 2016)

2.45 The Group Risk Assessment Model ("GRAM") is a risk assessment tool that predicts an offender's likelihood of reoffending within 24 months of committing a particular offence. The GRAM model was developed to obtain more accurate estimates of trends in reoffending over time by comparing predicted reoffending rates with observed reoffending rates. The GRAM approach can also be used as a triage or screening tool to identify higher-risk offenders who may need further assessment or intervention. GRAM can assist correctional agencies identify those individuals who may need more intensive case management or referral to specific treatment programs.

2.46 An important consideration in the application of these screening tools is the extent to which they can accurately distinguish recidivists from non-recidivists. Misclassifications in the form of "misses" (individuals not identified as high-risk but who reoffended) and "false alarms" (individuals mistakenly identified as high-risk) incur costs both to the state in terms of money wasted, and to the individual and their family who are subjected to unnecessary state intervention.

2.47 The purpose of the BOCSAR study was to update and recalibrate the GRAM model based on more recent data.

2.48 The study looked at a cohort of 81,199 offenders who had been convicted of at least one offence but who had not received a custodial sentence. The dependent variable in the study was whether a person reoffended within two years of the original court appearance. The explanatory variables included in the regression model predicting reoffending included demographic features such as:

- whether the offender is a juvenile or an adult
- the sex of the offender
- age at first court appearance
- Indigenous status
- remoteness of area of residency, and
- socio-economic disadvantage.

2.49 It also looked at the characteristics of the offence, including the type of offence and whether the appearance was in the Local, District or Supreme Court, and the offender's prior criminal history.

2.50 The study found that the strongest predictor of reoffending within 24 months of appearing in court was criminal history. The odds of a new offence was more than five times greater for offenders with four or more proven offences compared with offenders who had no prior offences. The odds of reoffending were 80% greater for offenders who had been previously sentenced to custody than for offenders who had no prior custodial sentence. Reoffending was also higher among male offenders, Indigenous offenders, younger offenders, and those with a greater number of concurrent offences at their original court appearance.

2.51 The model tested, known as GRAM 2, had a high degree of accuracy in predicting two-year recidivism rates.

2.52 The viability of GRAM 2 as a screening tool was also assessed. The results showed that while the model was well placed to screen offenders when they appear in court or after they have been sentenced, it performed poorly when using only police charge data. A different screening tool would need to be developed if it were necessary to screen offenders at the point of charge.

2.53 The study concluded that GRAM 2 provides a satisfactory basis for predicting reoffending at the population level, however its usefulness at the individual level was limited. Therefore GRAM 2 should be viewed as a first-step triage instrument to identify high-risk offenders.

3. Operation of guideline judgments

In brief

This Chapter looks at the operation of guideline judgments by analysing references to them in the judgments of the higher courts

3.1 The tables below show the consideration that the NSW Court of Criminal Appeal and Supreme Court have given to the guideline judgments during 2015.

High-range prescribed content of alcohol

Table 2.1: High-range PCA

Guideline judgment	Attorney General's application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (NSW) (No 3 of 2002) [2004] NSWCCA 303; 61 NSWLR 305.		
Total in 2016	0	Total in 2015	0

Taking matters into account on Form 1

Table 2.2: Taking matters into account on Form 1

Guideline judgment	Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (NSW) (No 1 of 2002) [2002] NSWCCA 518; 56 NSWLR 146.		
Applied	R v Xiao [2016] NSWSC 240		
Considered	Lamis v R [2016] NSWCCA 274 R v Lulham [2016] NSWCCA 287 R v Dashti [2016] NSWCCA 251 Des Rosiers v R [2016] NSWCCA 196 Shahzad v R [2016] NSWCCA 94		
Cited	Lehn v R [2016] NSWCCA 255 Alrubae v R [2016] NSWCCA 142 TC v R [2016] NSWCCA 3 Abdulrahman v R [2016] NSWCCA 192 R v Ejefekaire [2016] NSWCCA 308 Hart v Attorney-General for New South Wales [2016] NSWCCA 71 AK v R [2016] NSWCCA 238 Usher v R [2016] NSWCCA 276 R v Crowe [2016] NSWCCA 39 R v Van Ryn [2016] NSWCCA 1		
Total in 2016	16	Total in 2015	10

Break, enter and steal

Table 2.3: Break, enter and steal

Guideline judgment	R v Ponfield [1999] NSWCCA 435; 48 NSWLR 327.		
Applied	Abdulrahman v R [2016] NSWCCA 192		
Considered	Dickinson v R [2016] NSWCCA 301		
Cited	R v Egan [2016] NSWCCA 285 Usher v R [2016] NSWCCA 276 R v Crowe [2016] NSWCCA 39 Efthimiadis v R (No 2) [2016] NSWCCA 9 McCabe v R [2016] NSWCCA 7		
Total in 2016	7	Total in 2015	3

Armed robbery

Table 2.4: Armed robbery

Guideline judgment	R v Henry [1999] NSWCCA 111; 46 NSWLR 346.		
Applied:	Sullivan v R [2016] NSWCCA 172 Martin v R [2016] NSWCCA 104 Walker v R [2016] NSWCCA 224		
Considered	Shipman v R [2016] NSWCCA 83 Martin v R [2016] NSWCCA 273 R v Hetherington [2016] NSWCCA 165 Tregeagle v R [2016] NSWCCA 106 R v Faaoloii [2016] NSWCCA 263 White v R [2016] NSWCCA 190 OK v R [2016] NSWCCA 318 Faleafga v R [2016] NSWCCA 178		
Cited	Hudson v R [2016] NSWCCA 30 Daniels v R [2016] NSWCCA 35 R v Weismantel [2016] NSWCCA 204 Kelly v R [2016] NSWCCA 246 Ingrey v R [2016] NSWCCA 31 Kremisis v R [2016] NSWCCA 257 Barbieri v R [2016] NSWCCA 295 MM v R [2016] NSWCCA 235 Zreika v R [2016] NSWCCA 177 Humphries v R [2016] NSWCCA 86 Panetta v R [2016] NSWCCA 85 McCabe v R [2016] NSWCCA 7 R v A2 [2016] NSWSC 282 R v Blanks [2016] NSWSC 707 R v Wran [2016] NSWSC 1015 R v Hart (No 5) [2016] NSWSC 1612		
Total in 2016	27	Total in 2015	15

Sentencing discount for guilty plea

Table 2.5: Sentencing discount for guilty plea

Guideline judgment	R v Thomson [2000] NSWCCA 309; 49 NSWLR 383.		
Applied	Sullivan v R [2016] NSWCCA 172 Prothonotary of the Supreme Court of New South Wales v Ceren [2016] NSWSC 1187		
Considered	Silvestri v R [2016] NSWCCA 245 Mooney v R [2016] NSWCCA 231 Haines v R [2016] NSWCCA 90 Faleafga v R [2016] NSWCCA 178 R v Faaoloii [2016] NSWCCA 263 Panetta v R [2016] NSWCCA 85 Lee v R [2016] NSWCCA 146 Barbieri v R [2016] NSWCCA 295 Martin v R [2016] NSWCCA 104 R v Misiepo [2016] NSWSC 565		
Cited	Lehn v R [2016] NSWCCA 255 Zhao v R [2016] NSWCCA 179 AC v R [2016] NSWCCA 107 R v Price [2016] NSWCCA 50 Gifford v R [2016] NSWCCA 302 R v Weismantel [2016] NSWCCA 204 Flaherty v R [2016] NSWCCA 188 White v R [2016] NSWCCA 190 Shine v R [2016] NSWCCA 149 Prothonotary of the Supreme Court of New South Wales v Ceren [2016] NSWSC 1187 R v Merrick (No 5) [2016] NSWSC 661 R v Stanford, Vincent [2016] NSWSC 1434 R v Xiao [2016] NSWSC 240		
Total in 2016	25	Total in 2015	15

Dangerous driving

Table 2.6: Dangerous driving

Guideline judgment	R v Whyte [2002] NSWCCA 343; 55 NSWLR 252 reformulating *R v Jurisic* (1998) 45 NSWLR 209		
Applied	Kerr v R [2016] NSWCCA 218		
Considered	Silvestri v R [2016] NSWCCA 245 R v Smith [2016] NSWCCA 75 R v Barker [2016] NSWCCA 193 Lehn v R [2016] NSWCCA 255 Priovolidis v R [2016] NSWCCA 201		
Cited	Vale v R [2016] NSWCCA 154 R v Price [2016] NSWCCA 50 R v Van Ryn [2016] NSWCCA 1		
Total in 2016	9	Total in 2015	9

4. Cases of interest

In brief

This Chapter summarises the cases of interest delivered by the High Court, the NSW Court of Criminal Appeal and the Supreme Court that relate to sentencing.

Use of fresh evidence in severity appeals

Betts v The Queen [2016] HCA 25

4.1 The offender appealed the severity of a sentence of 16 years imprisonment with a non-parole period of 11 years imposed by the District Court. The Court of Criminal Appeal ("CCA") upheld two grounds but dismissed the appeal having determined that no lesser sentence was warranted in law.

4.2 At the appeal, counsel for the offender handed up a folder of material expecting that it would be admissible if the CCA came to resentence the offender. The folder contained reports by a psychiatrist and a psychotherapist about the factors that had caused or contributed to the commission of the offence. The reports were inconsistent with evidence at sentencing in the District Court. The CCA declined to take the reports into account holding that the appeal was not the occasion to address these matters.

4.3 The sole ground of appeal was that the CCA erred in failing to take into account new evidence bearing on the causes of the appellant's offending in determining whether a less severe sentence was warranted.

4.4 The High Court observed:

> As a general rule, the appellate court's assessment of whether some other sentence is warranted in law is made on the material before the sentencing court and any relevant evidence of the offender's progress towards rehabilitation

> in the period since the sentence hearing. For the purposes of that assessment, an offender is not permitted to run a new and different case. This general rule does not deny that an appellate court has the flexibility to receive new evidence where it is necessary to do so in order to avoid a miscarriage of justice. In this appeal, the general rule applied because the new evidence sought to be adduced by the appellant was inconsistent with the case that he ran in the sentencing court and its rejection in the circumstances did not cause justice to miscarry.[1]

4.5 The Court held that "nothing in the new evidence supports the submission that the Court of Criminal Appeal's refusal to permit the appellant to run a different case before it has occasioned a miscarriage of justice".[2]

Sentencing the "worst category" of offence

R v Kilic [2016] HCA 48

4.6 The offender was sentenced in the County Court of Victoria after pleading guilty to a charge of intentionally causing serious injury (the principal offence) and summary offences of using a prohibited weapon and dealing with suspected proceeds of crime.

4.7 The Court imposed a sentence of 14 years imprisonment for the principal offence. The effective sentence for all offences was 15 years with a non-parole period of 11 years.

4.8 The Victorian Court of Appeal allowed the offender's appeal against sentence holding that there was "such a disparity between the sentence imposed [for the principal offence] and current sentencing practice" that it was apparent that there had "been a breach of the underlying sentencing principle of equal justice". The Court of Appeal resentenced the offender to a total effective sentence of 10 years and 10 months imprisonment with a non-parole period of 7 years and 6 months.

4.9 The High Court allowed a Crown appeal that the Court of Appeal erred by holding that the difference between the County Court sentence and sentences imposed in other cases to which the Court of Appeal was referred warranted a conclusion that the County Court sentence was manifestly excessive. The High Court allowed the appeal and ordered that the appeal to the Court of Appeal be dismissed.

4.10 In deciding the appeal, the High Court considered whether the Court of Appeal erred in describing the offence as within the "worst category of this offence". The finding of error, however, was without relevant consequence in the appeal as the High Court took the expression to be used "in the sense of an instance of the offence of intentionally causing serious injury towards the upper end of the range of seriousness".

4.11 The High Court observed that an offence that falls into the "worst category" is an offence that is "so grave" that it warrants the imposition of the maximum penalty, taking into account both the nature of the crime and the circumstances of the offenders. An offence can fall within the worst category even though it may be possible to imagine a worse instance of the offence. The High Court, therefore,

1. *Betts v The Queen* [2016] HCA 25 [2].
2. *Betts v The Queen* [2016] HCA 25 [59].

noted that, in the case of a grave instance of an offence, but one that is not so grave as to warrant the maximum penalty:

> It is potentially confusing ... and likely to lead to error to describe an offence which does not warrant the maximum prescribed penalty as being "within the worst category". It is a practice which should be avoided.[3]

4.12 The High Court also noted the danger of courts observing in some cases that, although an offence is a serious or particularly serious instance of an offence, it is not within "the worst category":

> To do so is not inaccurate and it may be thought a convenient form of legal shorthand. But lay persons are unlikely to be familiar with the legal signification of the expression and, as a result, might wrongly take it to mean that the judge has underestimated the seriousness or effects of the offence. In order to avoid difficulties of that kind, sentencing judges should avoid using the expression "worst category" and instead, in those cases where it is relevant to do so, state in full whether the offence is or is not so grave as to warrant the maximum prescribed penalty.[4]

Sentencing for historic juvenile offences

TC v R [2016] NSWCCA 3

4.13 The offender pleaded guilty to an indecent assault on a child and asked for a further indecent assault to be taken into account on a Form 1. Both offences took place nearly 38 years previously when the offender was 17.5 years old.

4.14 The sentencing judge imposed a 2-year good behaviour bond under s 9 of the *Crimes (Sentencing Procedure) Act 1999* (NSW). The sentencing judge referred to the applicable principles for sentencing historical child sexual assault matters.

4.15 The offender appealed the sentence on the ground that the sentencing judge failed to take into account the sentencing regime (including the sentencing options) for juveniles at the time of the offences under the *Child Welfare Act 1939* (NSW).

4.16 There was a range of sentencing options available to the Children's Court, other than imprisonment, including dismissing the charge, or admonishing and discharging the young person, or discharging the young person conditionally on his or her entering into a recognizance to be of good behaviour, in each case without proceeding to a finding of guilt.

4.17 It was conceded that little information was available about Children's Court sentencing practices at the time because most cases were unlikely to have been reported.

4.18 The judge was not specifically taken to the relevant sections of the *Child Welfare Act* but he was referred to very similar sentencing options that were available under the *Children (Criminal Proceedings) Act*, which included the proposed option of a bond without recording a conviction. The judge did not refer to either statutory regime in his remarks on sentence.

3. *R v Kilic* [2016] HCA 48 [19].
4. *R v Kilic* [2016] HCA 48 [20].

4.19 The Crown accepted that, if his Honour did not sentence having regard to the *Child Welfare Act*, that would be an error of the kind referred to in *House v The King* (1936) 55 CLR 499, 505.

4.20 The CCA found the ground made out. However, in resentencing the offender, it was not persuaded that a lesser sentence was warranted in law.

Taking general deterrence into account when sentencing domestic violence offences

Efthimiadis v R (No 2) [2016] NSWCCA 9

4.21 This case involved a resentencing following a conceded error in the sentencing judge's approach to the standard non-parole period provisions.

4.22 The offender was convicted of soliciting the murder of his ex-partner who had custody of their son. The sentencing judge found that the offence was explained by the offender's desire to have his partner out of the way so that he could gain custody of his son. Justice Price (with whom Justice Harrison agreed) observed:

> In my mind, there is another reason that general deterrence has significance in the present case. All too often partners in a domestic relationship resort to violence. The community cannot tolerate violence in any domestic setting, but the community's abhorrence of a crime intended to secure the custody of a young child by the murder of the mother needs to be expressed in the sentence to deter persons who might be like-minded to commit such a crime.[5]

The relationship between indicative sentences and aggregate sentences

Dimian v R [2016] NSWCCA 223

4.23 The offender pleaded guilty to detaining for advantage and causing substantial injury and aggravated sexual assault, the aggravation being malicious infliction of grievous bodily harm. A second offence of aggravated sexual assault was taken into account on a Form 1.

4.24 Section 53A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) enables the Court to impose an aggregate sentence. The judge imposed an aggregate sentence of 9 years (expiring on 16 February 2023) with a non-parole period of 6 years. The judge specified the indicative sentences as being two years for the first offence and five years and six months for the second offence taking into account the Form 1 offence.

4.25 On appeal, it was asserted that the judge had erred in imposing an aggregate sentence that exceeded the sum of the indicative sentences. The Crown submitted that there was no statutory requirement that indicative sentences represent a head sentence.

4.26 The CCA observed:

5. *Efthimiadis v R (No 2)* [2016] NSWCCA 9 [86].

> On any proper construction of s 53A seen in the context of the whole of the Sentencing Act, the sentence that would have been imposed (called the indicative sentence) must be a reference to the overall sentence. The Sentencing Act does not contemplate two sentences for any one offence. It contemplates a sentence and in many cases a non-parole period and a balance of the term.[6]

4.27 The CCA therefore concluded that as the total of the indicative sentences was less than the aggregate sentence, error had been demonstrated.

Sentencing offenders who are already serving sentences

Dimian v R [2016] NSWCCA 223

4.28 On resentencing the offender, after a successful appeal (see above), the CCA observed that the offender had been in continuous custody since 2003 for a series of sexual offences. The CCA considered the issue of sentencing offenders where a prior sentence was being served. Following *Mill v The Queen*,[7] the CCA asked what would be the appropriate head sentence if the offender had been sentenced for all of the offences for which he had been incarcerated since 2003:

> Two of the purposes of sentencing in s 3A of the Sentencing Act are the promotion of the rehabilitation of the offender and the protection of the community from the offender. Although keeping an offender in custody obviously protects the community in the short term it may not do so in the long term if adequate rehabilitation is not achieved particularly for a repeat sex offender. Avoiding an offender becoming institutionalised can only assist rehabilitation and, in the case of a repeat sex offender, the community is also protected by an adequate period on parole to further the rehabilitation that has taken place in custody.[8]

4.29 The CCA concluded that the purposes of sentencing were best achieved by leaving the head sentence at nine years but adjusting the non-parole period and by backdating the sentence. The principle of totality required a lower non-parole period and increased concurrency with the prior sentence. The CCA imposed a sentence of 9 years (expiring on 16 February 2022) with a non-parole period of 4 years and six months.

Resentencing an offender who has been bailed pending an appeal after a period of pre-sentence custody

Walker v R [2016] NSWCCA 224

4.30 The offender pleaded guilty to one count of attempted robbery armed with an offensive weapon and one count of possession of a prohibited weapon (a taser). An offence of break, enter and steal was dealt with on a Form 1. For the attempted armed robbery he was sentenced to 2 years 9 months imprisonment with a non-parole period of 10 months. For the possession offence he was sentenced to a 12 month s 9 bond.

6. *Dimian v R* [2016] NSWCCA 223 [46].
7. *Mill v The Queen* (1988) 166 CLR 59.
8. Dimian v R [2016] NSWCCA 223 [62].

4.31 On appeal, the Crown conceded two of the grounds of appeal leaving the only issue as the appropriate sentence to be imposed.

4.32 The offender served 236 days in pre-sentence custody. He was released to bail pending the appeal, presumably on the basis that he would have served the remaining 62 days in fulltime custody before the appeal could be heard.

4.33 The CCA considered that a lesser sentence was warranted and ordered that the offender be assessed for an intensive correction order of 16 months. The CCA observed that simply deciding that no lesser sentence was warranted would result in the offender returning to custody for 62 days, followed by a period on parole of one year and 11 months. This would be less likely to achieve the purposes of sentencing than an intensive correction order, which would be more restrictive of the offender and therefore promote his rehabilitation while protecting the community. The CCA concluded:

> Because of the unusual circumstances of this case the imposition of an Intensive Correction Order for what must be regarded as a serious crime of violence should not be seen as a precedent for future guidance to sentencing judges.[9]

4.34 The CCA imposed an ICO following a favourable assessment.[10]

Resentencing after a successful appeal on the amount of a utilitarian discount

Lehn v R [2016] NSWCCA 255

4.35 The offender pleaded guilty and was sentenced as follows:

- aggravated dangerous driving causing death: 10 years with a non-parole period of 7 years
- stealing a motor vehicle: 2 years fixed term (two counts of possessing prohibited drugs were taken into account on a Form 1).

4.36 The two sentences were partially accumulated giving an effective head sentence of 11 years with a non-parole period of 8 years.

4.37 The sentencing judge, while accepting that the plea of guilty was entered at the earliest opportunity, allowed a discount of 20% for the utilitarian benefit of the plea, rather than 25%. The aim was not to reduce the sentence below a level that would accurately reflect the Court's assessment of the objective gravity of the offending conduct.

4.38 The Crown accepted that procedural unfairness had occurred. No submission had been made for anything less than a 25% discount and the judge had not indicated that he intended to grant a lesser discount.

4.39 The question was whether the CCA must re-exercise the sentencing discretion generally or only in respect of the discrete component affected by error, that is,

9. *Walker v R* [2016] NSWCCA 224 [58].
10. *Walker v R (No 2)* [2016] NSWCCA 294.

whether the CCA should simply adjust the sentence to take account of a 25% discount rather than a 20% discount.

4.40 The Chief Justice (with whom the majority agreed) held that it was necessary for the CCA, having found error, to exercise its discretion to resentence the offender, rather than to focus on correcting the discrete component of the sentence that was the subject of the error.

4.41 In reaching this conclusion, the Chief Justice noted that:

- It is not mandatory to grant the utilitarian discount of 25% for a plea entered at the earliest possible opportunity and that it is a question for judicial discretion.
- The application of a utilitarian discount (for example, for an early guilty plea or assistance to authorities) is normally not connected to any of the purposes of sentencing. In this case, the approach the judge took meant that the question of the extent of the discount directly related to a sentencing purpose, namely, ensuring that the penalty reflected the offence's objective gravity.
- Such a denial of procedural fairness as occurred in this case would entitle the aggrieved party to a rehearing, unless a particular breach would not have affected the outcome.
- Section 6(3) of the *Criminal Appeal Act* requires the CCA, if there is an error that affects the exercise of the sentencing discretion, to form its own view of the appropriate sentence, although not necessarily to resentence.

4.42 The CCA concluded that a lesser sentence was warranted and resentenced the offender accordingly.

The importance of general deterrence as a factor in sentencing members of small occupational groups

R v Crumpton [2016] NSWCCA 261

4.43 The offender flew a small aircraft low over the Clarence River and hit power cables, resulting in the death of one passenger and serious injury to another. He was found guilty by a jury and sentenced as follows:

- operating an aircraft in a manner reckless as to endanger life – 15 months imprisonment
- operating an aircraft in a manner reckless as to endanger person – 9 months imprisonment.

The two sentences were to be served concurrently. The Court released the offender immediately upon entering a recognisance to be of good behaviour for 3 years.

4.44 The Crown appealed on the grounds that the sentence was manifestly inadequate.

4.45 In considering the sentencing judge's assessment that general deterrence was not particularly important, the CCA observed that:

> general deterrence is a significant matter where an offence is committed in relation to the flying of an aircraft. Unlike drivers of motor vehicles who make up

> most of the adult population, pilots of aircraft are a small group in society. ... the smaller rather than the larger group is more likely to be deterred from offending. Aircraft accidents in this country are relatively rare because of the high standard of training and regulation. Fatalities from aircraft accidents are even rarer. It may be accepted, however, that the likelihood of death and serious injury is far greater as a result of reckless flying than from reckless driving. It can reasonably be expected that those who pilot aircraft, particularly non-commercial aircraft, would know of that greater risk. Such persons are also likely to be very aware of accidents involving aircraft and particularly those that have involved fatalities.
>
> Punishment of those who commit offences involving flying aircraft is calculated to come to the attention of the relatively small group of persons involved in doing so in the community. Analogy in that regard with the effect of general deterrence on white collar crime is not misplaced for some of the reasons that have been offered in cases such as insider trading and associated market offences: DPP (Cth) v Gregory (2011) 34 VR 1; [2011] VSCA 145 at [53].[11]

4.46 The CCA imposed longer sentences for both offences (21 months and 12 months respectively) and partially accumulated them, amounting to a sentence of 2 years imprisonment to be served by way of an Intensive Correction Order if the offender was assessed as suitable. The offender was subsequently assessed as suitable.[12]

Resentencing after the offender fails to fulfil an undertaking to assist authorities

R v X [2016] NSWCCA 265

4.47 The offender was sentenced for a variety of offences to a head sentence of 2 years 6 months with a non-parole period of 18 months. The sentence was subject to a total discount of 50% made up of:

- 25% for the utilitarian value of the pleas of guilty; and
- 25% for the respondent's assistance, apportioned equally between past and future assistance.

4.48 For the future assistance, the respondent had undertaken to assist the authorities in three separate matters, one of which was a prosecution for murder, in respect of which the offender had provided a statement to police. Although the offender did give evidence for the Crown in the trial, he did not give evidence in accordance with his undertaking.

4.49 The Director of Public Prosecutions appealed under s 5DA of the *Criminal Appeal Act 1912* (NSW) on the grounds that the offender received a reduced sentence for his undertaking to assist law enforcement authorities and failed to fulfil that undertaking.

4.50 The appeal was heard after the sentence had expired.

11. *R v Crumpton* [2016] NSWCCA 261 [59]-[60].
12. *R v Crumpton (No 2)* [2017] NSWCCA 3.

4.51 The CCA accepted the Crown's submission in which it stressed the importance to the administration of justice of such undertakings and the associated importance of making it clear that the Court will treat breaches of such undertakings seriously.

4.52 The CCA also noted that in other cases the fact that the sentence had expired and the offender might only return to custody for a short period weighed in favour of the court exercising its discretion not to intervene. However, each case depends on its facts, and in this case, the CCA decided that other considerations outweighed these factors.

4.53 The CCA sentenced the offender to 6 weeks imprisonment.

R v MG [2016] NSWCCA 304

4.54 The offender pleaded guilty and was sentenced for the offences of accessory after the fact to murder and accessory after the fact to shooting with intent to murder. The total sentence was 1 year, 10 months, and 2 weeks with a non-parole of 10 months and 2 weeks. In arriving at this sentence, the judge allowed a total discount of 50%, being 25% for the utilitarian value of the guilty pleas and a further 25% for assistance (10% for past assistance and 15% for future assistance). The future assistance was to give evidence against two accused in relation to a shooting and murder.

4.55 The DPP appealed to the CCA under s 5DA of the *Criminal Appeal Act 1912* (NSW) on the ground that the offender failed to fulfil his undertaking.

4.56 The CCA found that the offender had failed substantially to fulfil the whole of his undertaking to give evidence in the murder trial. The evidence was "of a very different character" from the evidence he undertook to give in accordance with his earlier statement because it provided support for a case of self-defence. It was accepted that the offender received an overall discount of 7.5% for his undertaking to give that evidence, amounting to 6 weeks.

4.57 In exercising its discretion to sentence the offender, the CCA observed that the purpose of the power under s 5DA is not punitive but is rather to enable the Court to amend a sentence where the reason for the discount has, with the benefit of hindsight, been removed. The CCA concluded that "any variation to his sentence should reflect the punishment that he would have received but for the, now apparent, false premise upon which that sentence was imposed".

4.58 The CCA rejected as irrelevant the following matters that were raised in support of a submission that the CCA should not exercise its discretion to vary the existing sentence:

- the variation would be for a short period of up to six weeks
- the offender gave evidence at the committal without any criticism
- the offender gave important evidence as to the general circumstances of the case
- the offender had been released for approximately two years and had not committed or been charged with any further offences
- the offender had secure employment, was the sole provider for his family and had otherwise proven rehabilitation.

4.59 Given the whole of the sentence had been served, the CCA ordered that the offender be sentenced to a further fixed term of 6 weeks imprisonment.

Sentencing where the offence was committed in the victim's home

Jonson v R [2016] NSWCCA 286

4.60 The offender was found guilty after a trial and convicted of recklessly inflicting grievous bodily harm and two counts of having sexual intercourse without consent. He was sentenced to an aggregate term of 9 years imprisonment with a non-parole period of 6 years and 5 months.

4.61 The offender and victim were in a domestic relationship and the offender was entitled to be at the premises where the offences occurred.

4.62 The sentencing judge took into account as an aggravating factor that the offences were committed in the home of the victim under s 21A(2)(eb) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

4.63 The offender appealed the sentence. One of the issues on appeal was whether the sentencing judge erred in finding that s 21A(2)(eb) applied. Past CCA authority held that the common law requirement that the offender had to be an intruder on the premises had to be met for s 21A(2)(eb) to apply. However, some judges had questioned this position. A five judge bench was therefore convened because of the general importance of the question.

4.64 The CCA noted that s 21(2)(eb) does not explicitly require that the offender be an intruder in the home, and that its application is not limited to offences that occur in the home of the victim.

4.65 The purpose of the section is that a home is a place where a person who resides there, or is otherwise present, should be safe and secure. Thus, it would extend to people visiting a relative's house, or people in a domestic relationship at the offender's home. This is consistent with Parliament's intention as expressed in the second reading speech for the amending bill that introduced the provision.

4.66 The CCA observed that s 21A(4) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which limits the power of the Court to take into account an aggravating factor where it would be contrary to a "rule of law" to do so, does not apply. The general sentencing principle that only recognises the commission of an offence in the victim's home as an aggravating circumstance if it is committed by an intruder was not a "rule of law" for the purposes of s 21A(4).

4.67 The CCA concluded that the previous decisions that limited s 21A(2)(eb) were plainly wrong and should be overruled and dismissed the appeal on this point.

4.68 The CCA, however, warned that:

> the fact that s 21A(2)(eb) can extend beyond offences committed by an intruder does not mean that in all cases the fact that the offence occurred in a home will be an aggravating factor. It is necessary for the Court to conclude that, having

> regard to ordinary sentencing principles, it actually aggravates the offence in question.[13]

R v Lulham [2016] NSWCCA 287

4.69 The offender pleaded guilty to an offence of wounding with intent to cause grievous bodily harm. For this, and two matters of destroying or damaging property on a Form 1, the court sentenced him to 2 years imprisonment with a non-parole period of 1 month and 13 days (this represented the time he spent on remand before he was bailed).

4.70 The DPP appealed on the grounds that the sentence was manifestly inadequate. The CCA found that the sentence was manifestly inadequate but exercised its discretion not to intervene and resentence the offender.

4.71 The offence, against the stepfather of the offender's partner, took place in the driveway of the home in which the victim, his wife, the offender and his partner lived. The sentencing judge found that one of the main aggravating features was that the victim was attacked in his own home, notwithstanding that that home was also the offender's home. The question of the proper interpretation of s 21A(2)(eb) arose on appeal. In accordance with the decision in *Jonson*, which was argued at the same time, the CCA concluded that the offending was aggravated in the way the sentencing judge found.

4.72 In a separate judgment, the Chief Justice addressed the argument that the offence did not occur in the home as it took place at the top of the driveway rather than in the physical residence:

> As was made clear in the Second Reading Speech ... the reason it can be taken into account as an aggravating factor is that ... [it] involves a violation of the victim's reasonable expectation of safety and security in his or her home. It seems to me this expectation would extend not only to the actual physical residence but to the area on the same premises, at least reasonably adjacent to that building.
>
> As I also pointed out in *Jonson* at [52], the fact that the offence occurred in the home will not be an aggravating factor in all circumstances. When the offence occurs on the premises in question, but not in the physical residence, it would be a matter for the sentencing judge to determine whether, on ordinary sentencing principles, it does in fact aggravate the offence. In the present case, it was open to the sentencing judge to conclude that it did.[14]

Taking into account the harm caused by media coverage

4.73 The following cases are all first instance cases in the Supreme Court. Each sentencing judge considered whether adverse publicity for the offender should mitigate the sentence.

R v Curtis [No 3] [2016] NSWSC 866

4.74 The offender was found guilty by a jury of the Commonwealth offence of conspiracy to commit insider procuring.

13. *Jonson v R* [2016] NSWCCA 286 [52].
14. *R v Lulham* [2016] NSWCCA 287 [5]-[6].

4.75 The Supreme Court imposed a sentence of imprisonment of 2 years, with conditional release after serving one year. In imposing the sentence, the Court accepted that the primary considerations were general deterrence, particularly in the case of white collar crime, and the need to impose adequate punishment.

4.76 In the submissions on sentence, the offender submitted he received extra-curial punishment through damage to his professional reputation and professional relationships because of the case's intense media scrutiny. The Court concluded, on balance, that although the degree of adverse media reporting had not reached the level of some cases, the offender was likely to have suffered to some degree, and gave "some small weight" to that consideration.

R v Wran [2016] NSWSC 1015

4.77 The offender, the daughter of a former Premier of NSW, pleaded guilty to robbery in company and to being an accessory after the fact to murder. The offender had originally been charged with murder, but the DPP withdrew those charges. On the basis of an "extremely powerful" subjective case, genuine remorse and good prospects of rehabilitation, and a 20% discount for an early guilty plea, the Court imposed a sentence of 4 years imprisonment with a non-parole period of 2 years.

4.78 In considering the question of adverse publicity, the Court observed that the significant public attention the case attracted was "to a considerable extent the result of a misunderstanding, fuelled to a degree by ill-informed reporting in some sections of the media, about Ms Wran's participation in the relevant events and the basis of her pleas of guilty to the charges for which she is now to be sentenced".

4.79 Describing some of the coverage of the case as subjecting the offender to "a sustained and unpleasant campaign by some of the daily newspapers circulating in Sydney", the Court concluded that:

> the publication of these egregious articles warrants the imposition of a sentence that takes account of Ms Wran's continuing exposure to the risk of custodial retribution, the unavoidable spectre of enduring damage to her reputation and an impeded recovery from her ongoing mental health and drug related problems.[15]

R v Obeid (No 12) [2016] NSWSC 1815

4.80 The offender was found guilty of wilful misconduct in public office following a trial. The Court imposed a sentence of 5 years imprisonment with a non-parole period of 3 years.

4.81 In sentencing submissions, the offender contended that he had suffered a form of extra curial punishment from extensive media coverage which had humiliated him and affected members of his family.

4.82 The Supreme Court compared this case with that of Wran (above):

> *Wran* is an example of a case where extra curial punishment was occasioned by the publication of humiliating material obtained as a result of criminal charges being laid that was either unrelated to the offending in question or where the level of publicity for the material was disproportionate to any relevance it had to

15. *R v Wran* [2016] NSWSC 1015 [79].

> the offence in question. The offender in *Wran* was not a public figure and her offending did not involve the abuse of any public position.
>
> In this case the offender is a public figure, the offending did involve the abuse of a public position and the media reports that have been tendered do not sensationalise facts that are either irrelevant or trivial to the offending conduct. Instead, they are concerned with an issue of public importance, namely, political corruption.[16]

4.83 The Court acknowledged a body of authority to suggest that consequential public humiliation could mitigate sentence and concluded that the binding principle was that such publicity will only be considered where "it reaches such proportion as to have a physical or psychological effect on the offender".[17]

4.84 There was no evidence presented that described the adverse publicity as having had any direct physical or psychological effect on the offender. There was, however, some evidence that the adverse publicity affected the offender's family. The Court, therefore, considered "only in the relatively limited sense" the effect of the family's suffering on the offender.

16. *R v Obeid (No 12)* [2016] NSWSC 1815 [100]-[101].
17. *R v Obeid (No 12)* [2016] NSWSC 1815 [102].

5. Review of intensive correction orders

In brief

Since 2011 there has been moderate growth each year in the number of offenders sentenced to an intensive correction order ("ICO"). In 2016, 1906 offenders were sentenced to ICOs. In 2016, 1.2% of all NSW offenders were sentenced to an ICO for their principal offence. As a proportion of penalties imposed, ICOs are imposed most frequently in major cities and least frequently in very remote regions.

5.1 We report annually to the Attorney General on the operation and use of ICOs, in accordance with the intention outlined in the second reading speech to the *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010* (NSW).[1] This is the seventh such annual report. This is in addition to the review of the ICO provisions of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("CSPA") that we completed in October 2016.

5.2 This report covers the period from 1 October 2010, when ICOs first became available as a sentencing option in NSW, through to the end of December 2016. We have obtained statistical information on the use of ICOs from Corrective Services NSW ("CSNSW"), the State Parole Authority ("SPA") and the NSW Bureau of Crime Statistics and Research ("BOCSAR").

Background

5.3 In our 2007 *Review of Periodic Detention*,[2] we recommended that the sentence of periodic detention should be replaced by a new sentencing option: a community

1. NSW, *Parliamentary Debates*, Legislative Council, 22 June 2010, 24426.
2. NSW Sentencing Council, *Review of Periodic Detention* (2007).

corrections order. A community corrections order would supersede periodic detention within the sentencing hierarchy between a community service order ("CSO") and full-time imprisonment. This recommendation was implemented in 2010 as the ICO.

5.4 We considered that community corrections orders could remove inequalities for offenders whose location was a barrier to periodic detention, as well as providing case management support and addressing criminogenic needs through community work and program participation.[3]

Overview of ICOs

5.5 In summary, an ICO has the following characteristics:

- It is a sentence of imprisonment, of up to 2 years, which is served by way of intensive correction in the community, rather than in a correctional facility.[4]
- It has three key components:
  - supervision in the community by CSNSW
  - participation in tailored rehabilitation programs, as directed by CSNSW, and
  - completion of 32 hours per month of community service work.
- The sentence is not available for offenders who are under 18 years,[5] or who have committed a prescribed sexual offence.[6]
- A court cannot set a parole period for an ICO;[7] the offender must complete the entire length of the sentence, as outlined in the original court order. Alternatively, if an ICO is revoked and not re-instated, the offender must serve the balance of the sentence in custody.
- The court must decide whether a sentence of 2 years imprisonment or less is appropriate and then refer the offender for suitability assessment by CSNSW before imposing an ICO.[8]
- The assessment criteria include the offender's mental and physical health, substance abuse issues, and housing. These criteria are assessed in so far as such matters impact on the ability of the offender to comply with the obligations of the order, as well as any risk associated with managing the offender in the community.[9]

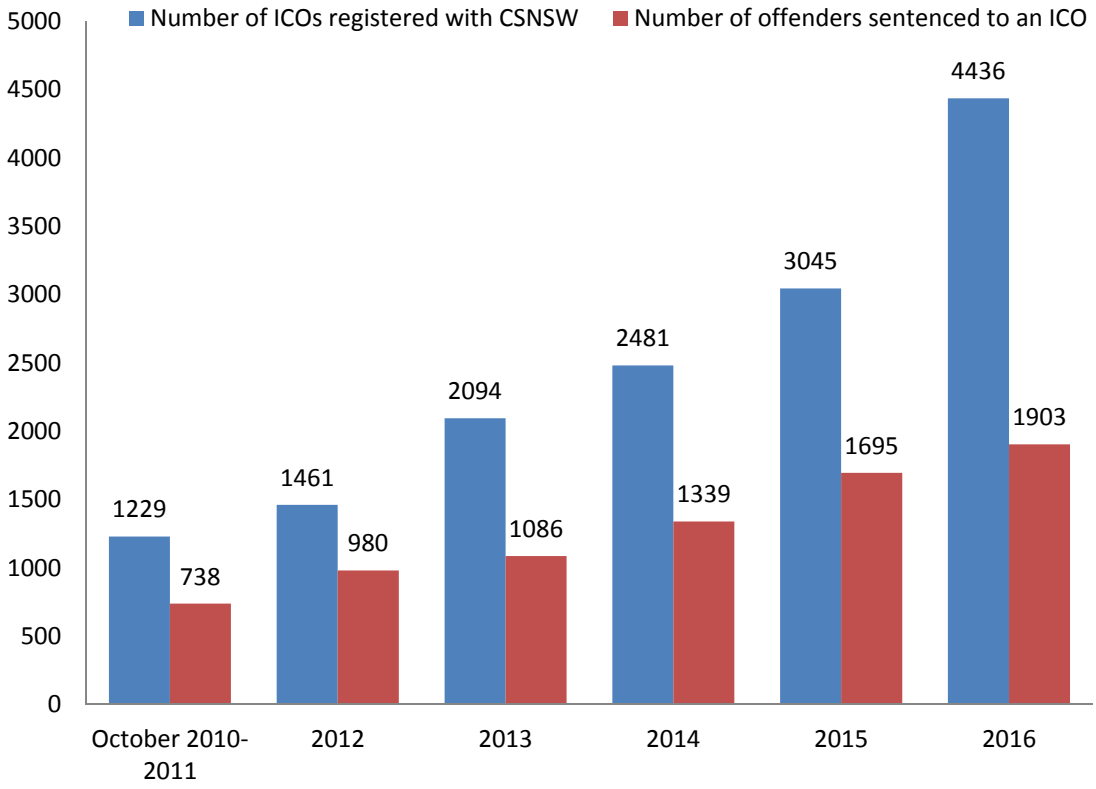
3. NSW Sentencing Council, *Review of Periodic Detention* (2007) [9.3].
4. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7.
5. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67(1)(a).
6. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 66. A prescribed sexual offence is defined under s 66 (2)(a) as an offence under *Crimes Act 1900* (NSW) pt 3 div 10 or 10A, where the victim is a person under the age of 16 years or where the elements include sexual intercourse as defined by *Crimes Act 1900* (NSW) s 61H. Under s 66, the definition of prescribed sexual offence also includes attempting, conspiracy and incitement, to commit such an offence.
7. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7(2).
8. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 70.
9. *Crimes (Sentencing Procedure) Regulation 2010* (NSW) cl 14.

Use of ICOs

5.6 Figure 5.1 below shows the number of offenders sentenced to an ICO and the number of ICOs that have been registered at CSNSW since the introduction of the order in October 2010. The data from Figure 3.1 shows that:

- In 2016, 1906 offenders were sentenced to 4436 ICOs.
- Since 2011 there has been moderate growth each year in the number of offenders sentenced to an ICO and the number of ICOs registered with CSNSW.[10]

Figure 5.1: The number of offenders sentenced to ICOs and the number of ICOs registered with CSNSW, 2010 – 2015.



Source: Corrective Services NSW, 2017.

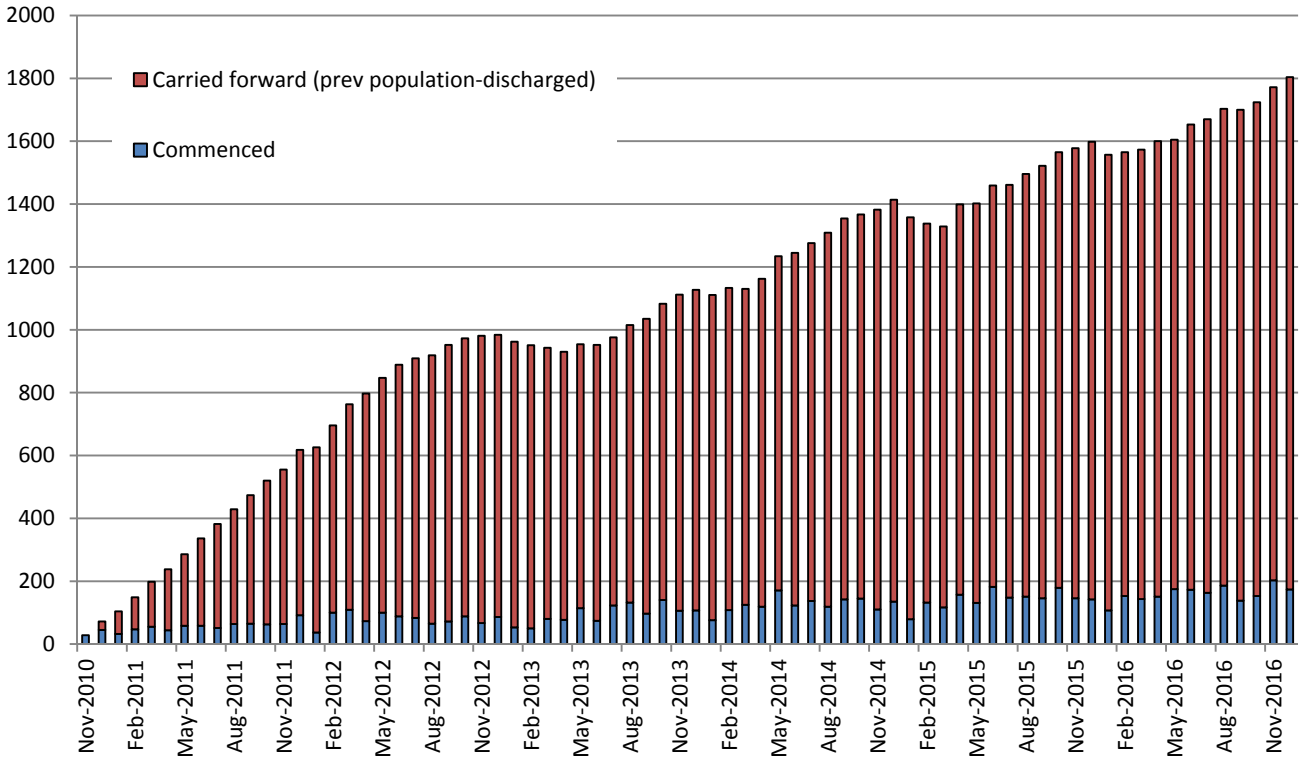
5.7 Figure 5.2 below illustrates the number of offenders supervised on an ICO, active at the end of each month, for the period November 2010 to December 2016. The data in Figure 5.2 shows:

- the initial upward trend in the total ICO offender population ended in December 2012, just over 2 years after the commencement of ICOs
- after initial downward trends at the start of 2013, the ICO offender population has steadily increased over time

10. Information provided by Corrective Services NSW, 2017.

- the month which saw the highest number of offenders serving an ICO (1804) was December 2016, and
- November 2016 saw the greatest number of new offenders (203) register for the commencement of an ICO.[11]

Figure 5.2: The number of offenders supervised on an ICO per month between November 2010 and December 2016



Source: Corrective Services NSW, 2017.

5.8 Table 5.1 shows the number of people who received an ICO for the principal offence in the NSW Local, District, and Supreme Courts from 2011-2016. The data in Table 5.1 shows the following:

- In 2016, 1.2% (1528) of all NSW offenders were sentenced in the Local, District, and Supreme Courts to an ICO as their principal penalty.
- The number of ICOs issued as the principal penalty has steadily increased each year since 2011.
- The percentage of ICOs issued, as a proportion of total principal penalties, has not increased since 2014.[12]

5.9 Despite the numerical increases, ICOs continue to represent only a small proportion the offender population in NSW.

11. Information provided by Corrective Services NSW, 2017.
12. Information provided by NSW Bureau of Crime Statistics and Research, 2016.

Table 5.1: The number and percentages of people receiving an ICO, as the principal penalty, in the NSW Higher and Local Courts, 2011-2016

Year	Number of penalties issued	Number of persons receiving an ICO	ICOs as a percentage of total penalties
2011	112,861	620	0.6
2012	105,840	898	0.8
2013	107,012	1032	1.0
2014	110,702	1285	1.2
2015	118,121	1337	1.1
2016	142,605	1528	1.2

Source: NSW Bureau of Crime Statistics and Research, 2017 (unpublished data, ref: Dg1613938HcLcC).

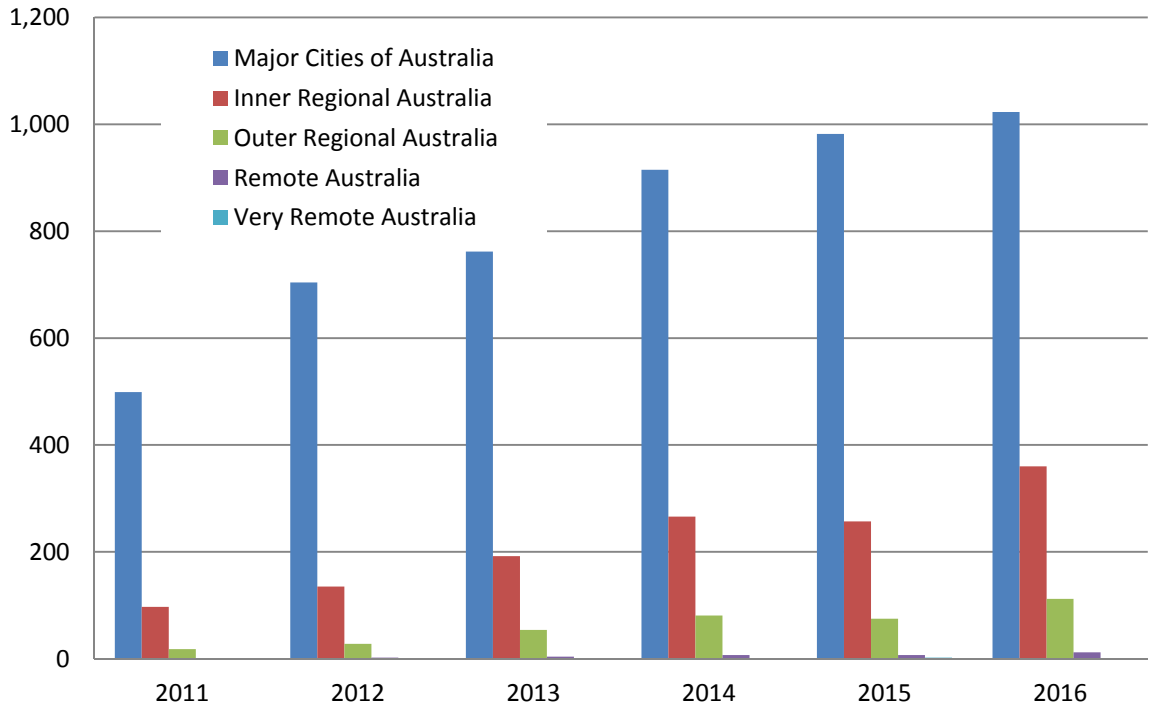
Regional use of ICOs

5.10 Figure 5.3 illustrates the number of people, by accessibility/remoteness index of Australia (ARIA), who received an ICO as the principal penalty in the NSW Higher and Local Courts from 2011–2016. ARIA is a nationally recognised measure of geographic remoteness used in Australia. The data from Figure 5.3 shows that in 2016:

- 1023 ICOs were issued in the Australian major cities
- 112 ICOs were issued in Outer Regional Australia (a 50% increase since 2015)
- 360 ICOs were issued in Inner Regional Australia, and
- 13 ICOs were issued in Remote and Very Remote Australia.[13]

13. Information provided by NSW Bureau of Crime Statistics and Research, 2016.

Figure 5.3: The number of people, by ARIA, receiving an ICO as the principal penalty in the NSW Higher and Local courts, 2011-2016



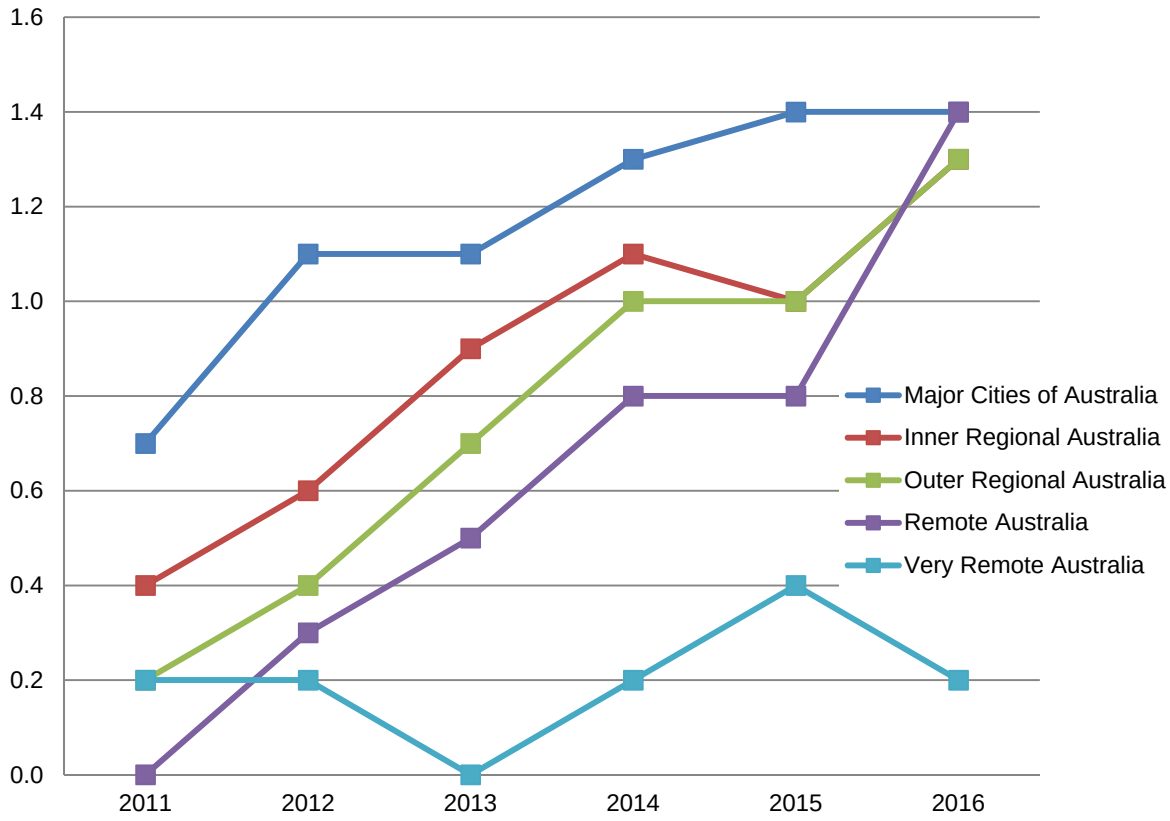
Source: NSW Bureau of Crime Statistics and Research, 2017 (unpublished data, ref: Dg1715247).

5.11 Figure 5.4 shows the percentage of people, by ARIA, who received an ICO as the principal penalty in the NSW Higher and Local Courts, as a proportion of all principal penalties for 2011–2016. The data from Figure 5.4 shows that:

- since 2011, there has been modest growth in the percentage of ICOs issued as a proportion of all principal penalties handed down from the NSW Higher and Local Courts
- this increase has been greatest in Outer Regional Australia, where ICOs issued has increased by approximately 107%
- overall, the proportion of ICOs of all penalties issued is merging across most regions, and
- as a proportion of all principal penalties, ICOs are used significantly less frequently in 'Very Remote Australia' compared to the other regions. [14]

14. Information provided by NSW Bureau of Crime Statistics and Research, 2016.

Figure 5.4: The percentage of people, by ARIA, receiving an ICO as the principal penalty in the NSW Higher and Local courts, as a proportion of all principal penalties, 2011-2016



Source: NSW Bureau of Crime Statistics and Research, 2017 (unpublished data, ref: Dg1715247).

Indigenous status

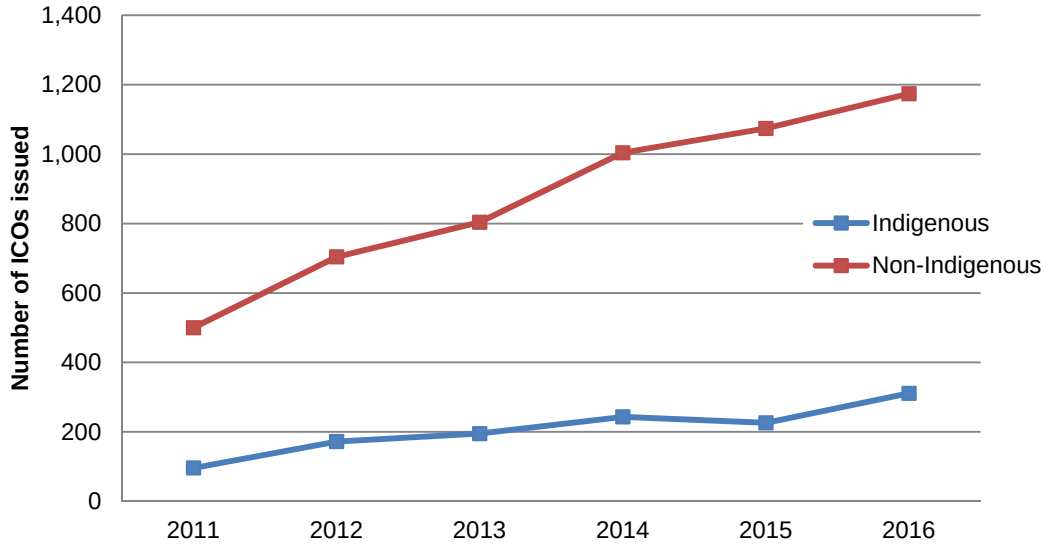
5.12 Figure 5.5 shows the number of people, by Indigenous status, who received an ICO as the principal penalty in the NSW Higher and Local Courts from 2011–2016. In 2016, 1528 offenders were issued an ICO as the principal penalty, of which:

- 311 (20.4%) were Indigenous offenders
- 1,174 (76.8%) were non-Indigenous offenders, and
- 43 (2.8%) were unknown.[15]

5.13 The number of non-Indigenous offenders receiving an ICO as the principal penalty has steadily increased since 2011. This upward trend is also generally reflected for Indigenous offenders. Although 2015 saw a 10.5% reduction in ICOs issued for Indigenous offenders, the rising trend resumed in 2016, with a 37.6% increase from 2015 and a 28% increase from 2014.

15. Information provided by NSW Bureau of Crime Statistics and Research, 2016.

Figure 5.5: The number of people, by Indigenous status, receiving an ICO as the principal penalty in the NSW Higher and Local courts, 2011-2016



Source: NSW Bureau of Crime Statistics and Research, 2017 (unpublished data, ref: Dg1715247).

ICO sentence lengths

5.14 Table 5.2 compares the average sentence length for people found guilty in finalised trial and sentence appearances in Local and Higher Courts for 2011–2016. Average sentence length has remained largely stable.

Table 5.2: Average sentence length, in months, for people sentenced to an ICO for their principle offence in the Local, District, and Supreme Court, 2011-2016

Year	Average sentence length in months			
	Local Court	District Court	Supreme Court	Average length across all courts
2011	9.8	20.4	24.0	11.5
2012	10.0	19.9	24.0	11.3
2013	10.2	20.1	-	11.7
2014	10.7	20.1	-	12.0
2015	10.0	20.3	-	11.9
2016	10.8	19.9	-	12.5

Source: NSW Bureau of Crime Statistics and Research, 2017 (unpublished data, ref: kr17-15249).

ICO suitability assessments

5.15 An offender may be referred for an ICO suitability assessment if the court is satisfied that no sentence other than imprisonment is appropriate and that the sentence is likely to be for a period of no more than two years.

5.16 Table 5.3 shows the outcomes of assessments for ICO suitability. In 2016, 2921 offenders were assessed.[16] Of the offenders who were assessed:

- 1907 (65%) were assessed as 'suitable'
- 962 (33%) were assessed as 'unsuitable', and
- 50 (2%) were included in the 'other' or 'unknown' category.[17]

5.17 The data in Table 5.3 indicates that the number of offenders assessed as 'suitable' for an ICO has steadily increased each year since October 2010. The greatest increase was from 2015 – 2016 when the number of offenders found suitable for an ICO increased by 14.1%, however, this may attributable to the almost 15% increase in offenders assessed for ICOs from 2015 to 2016.

Table 5.3: Sentencing outcomes for offenders assessed for ICO suitability

Assessment Outcome	2010 - 2012		2013		2014		2015		2016	
	No	%	No	%	No	%	No	%	No	%
Suitable	1725	57%	1190	58%	1507	61%	1672	66%	1907	65%
Unsuitable	1284	42%	799	39%	942	38%	831	33%	962	33%
Other/ Unknown	34	1%	50	3%	28	1%	38	1%	50	2%
Total	3043	100%	2039	100%	2477	100%	2541	100%	2921	100%

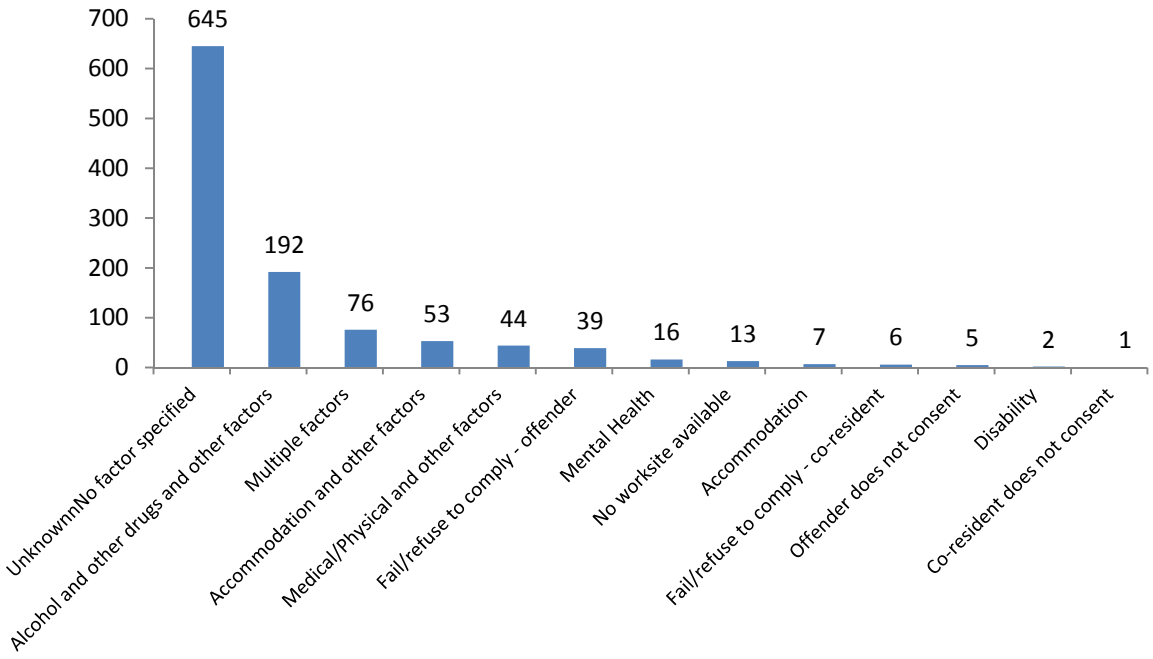
Source: Corrective Services NSW, 2017.

5.18 Numerous factors can contribute to an offender being assessed as unsuitable. Figure 5.6 below shows the most common factors that contributed to offenders being assessed as unsuitable in 2016. It can be seen from Figure 5.6 that of the 1099 offenders assessed as unsuitable in 2016:

- 645 offenders (58.69%) were assessed as unsuitable due to unknown or unspecified factors
- 192 offenders (17.47%) were assessed as unsuitable due to alcohol, drugs, and other factors, and
- 76 offenders (6.92%) were assessed as unsuitable due to multiple factors.[18]

16. Information provided by Corrective Services NSW, 2017.
17 The category "Other" includes: resources not available, report rescinded, offender deceased and offender ineligible for ICO.
18. Information provided by Corrective Services NSW, 2017.

Figure 5.6: Factors contributing to an offender being assessed as unsuitable, 2016



Source: Corrective Services NSW, 2017.

Offence characteristics

5.19 Table 5.4 shows the most common offences for which ICOs were imposed in 2016.[19] The three most common offences were:

- acts intended to cause injury (638, 33.3%)
- traffic and vehicle regulatory offences (388, 20.2%), and
- illicit drug offences (245, 12.8%).[20]

19. This data was collated with reference to the most serious offence for which an ICO was imposed, where the offender was sentenced for more than 1 offence, based on the National Offence Index, which provides an ordinal ranking of offence categories in the Australian Standard Offence categories (ASOC). Note that the offence type data recorded by Corrective Services NSW differs from the offence type data recorded by BOSCAR due to their different counting rules.
20. Data provided by Corrective Services NSW, 2017.

Table 5.4: Profile of the most common offences for which ICOs were imposed, 2010-2016

Offence classification	2010 - 2012		2013		2014		2015		2016	
	Offend-ers	%	Offend-ers	%	Offend-ers	%	Offend-ers	%	Offend-ers	%
Homicide and related offences	5	0.3	3	0.3	2	0.1	1	0.1	8	0.4
Acts intended to cause injury	458	27	340	28.5	456	30.2	545	31.8	638	33.3
Sexual assault and related offences	23	1.4	16	1.3	22	1.5	28	1.6	44	2.3
Dangerous or negligent acts endangering persons	110	6.5	76	6.4	77	5.1	76	4.4	83	4.3
Abduction, harassment and other offences against the person	6	0.4	9	0.8	8	0.5	17	1.0	16	0.8
Robbery, extortion and related offences	39	2.3	38	3.2	40	2.7	33	1.9	31	1.6
Unlawful entry with intent/burglary, break and enter	77	4.5	65	5.4	82	5.4	85	5.0	114	5.9
Theft and related offences	65	3.8	67	6.5	65	4.3	81	4.7	77	4.0
Fraud, deception and related offences	117	6.9	66	5.5	98	6.5	97	5.7	127	6.6
Illicit drug offences	152	9.0	92	7.7	157	10.4	193	11.3	245	12.8
Prohibited and regulated weapons and explosives offences	30	1.8	13	1.1	23	1.5	25	1.5	31	1.6
Property damage and environmental pollution	25	1.5	16	1.3	16	1.1	13	0.8	21	1.1
Public order offences	24	1.4	12	1.0	27	1.8	32	1.9	39	2.0
Traffic and vehicle regulatory offences	518	30.6	349	29.3	396	26.2	433	25.3	388	20.2
Offences against justice procedures, govt security and govt operations	44	2.6	28	2.3	34	2.3	46	2.7	50	2.6
Miscellaneous offences	2	0.1	3	0.3	6	0.4	8	0.5	5	0.3
Total	1695	100	1193	100	1509	100	1713	100	1917	100

Source: Corrective Services NSW, 2017.
Offence classification in accordance with the Australian Standard Offence Classification 2008 Division.

Discharges

5.20 In 2016, 3183 ICOs were discharged; of this number:

- 2233 (70.2%) were discharged as the result of successfully completing the ICO
- 896 (28.1%) were revoked, and
- 54 (1.7%) were discharged for other reasons.

5.21 Table 5.5 below shows the numbers of ICOs that were discharged due to successful completion or to revocation from October 2010 – December 2016. There has been a gradual decrease each year in the number of discharges due to the successful completion of the order, as a percentage of all discharges.

Table 5.5: Discharge of ICOs

Reason for discharge	2010 - 2012		2013		2014		2015		2016	
	No	%	No	%	No	%	No	%	No	%
ICOs successfully completed	1032	78.5%	1262	72.8%	1570	70.9%	1917	71.3%	2233	70.2%
ICOs Revoked	261	19.8%	436	25.2%	589	26.6%	717	26.7%	896	28.1%
ICO discharged for other reasons	22	1.7%	35	2.0%	54	2.4%	54	2.0%	54	1.7%
TOTAL	1315	100%	1733	100%	2213	100%	2688	100%	3183	100%

Source: Corrective Services NSW, 2017.

Breach information

Breach process

5.22 It is CSNSW policy that all breaches of an offender's obligations under an ICO require a response within 5 working days of the breach's discovery. The response can be managed at a number of levels. Where a Community Corrections Officer determines that a breach can be managed locally, the breach will be managed by such means as:

- verbal and written warnings
- imposing a more stringent application of the ICO conditions
- restricting an offender's association with certain people or access to certain places, and
- case management strategies relevant to the breach (for example, referral to drug intervention strategies if drug use is detected).

5.23 More serious breaches will be referred to SPA, and in the case of offenders who have been sentenced for a federal offence, to the Commonwealth Director of Public

Prosecutions ("CDPP"). In some circumstances, it is mandatory to submit a breach report to SPA or the CDPP. These circumstances include when an offender:

- has absconded
- removed his or her electronic monitoring device
- is found to be in possession of firearms or offensive weapons
- has been arrested for, or convicted of, a new offence, or
- is deemed to be at risk of re-offending.

5.24 SPA can take a number of courses of action in response to a serious breach. For example, the SPA can issue a warning, impose a period of home detention for up to 7 days, or revoke the ICO.[21]

5.25 When a breach report is submitted to the CDPP, the CDPP will determine whether it is in the public interest to commence breach action. If so, the offender will be required to appear before a Magistrate, who can impose a fine, revoke the ICO and re-sentence the offender, or take no action.

5.26 After a breach report is submitted, the Community Corrections Officer continues to manage the offender according to his or her order conditions until advice is received from SPA or the CDPP.

Breach rates

5.27 In 2016, SPA revoked ICOs for offenders on 445 occasions. Corrective Services NSW has advised that it cannot provide data about how many other breaches occurred that were resolved locally within this period.

5.28 Table 5.6 shows the number of offenders who had one or more ICOs revoked on a single occasion by SPA.

Table 5.6: Offenders with ICOs revoked by the State Parole Authority, 2011-2106

	2011	2012	2013	2014	2015	2016
Offenders with ICOs revoked	67	114	283	359	443	445

Source: NSW State Parole Authority, 2017.

5.29 In relation to the ICOs revoked by SPA, the majority of revocations were for breach of two or more conditions. Table 5.7 shows the number of breaches of key mandatory conditions that led to the revocation of an ICO for 2014-2016.

21. *Crimes (Administration of Sentences) Act 1999* (NSW) s 90.

Table 5.7: Mandatory conditions breached resulting in revocation of an ICO, 2014-2016

The breach of conditions which lead to revocation	Number of breaches of mandatory conditions resulting in revocation		
	2014	2015	2016
Undertake 32 hours of community service work per month	152	240	253
Be of good behaviour and not commit any offence	181	227	239
Comply with all reasonable directions of a supervisor	169	219	227
Engage in activities to address the factors associated with his or her offending	95	124	130
Reside only at premises approved by a supervisor	73	77	91
Refrain from using prohibited drugs, obtaining drugs unlawfully or abusing drugs lawfully obtained	48	64	62
Submit to breath testing, drug testing or other medically approved test procedures	15	12	19
Other	23	16	14
Total	756	979	1035

Source: Corrective Services NSW, 2017.

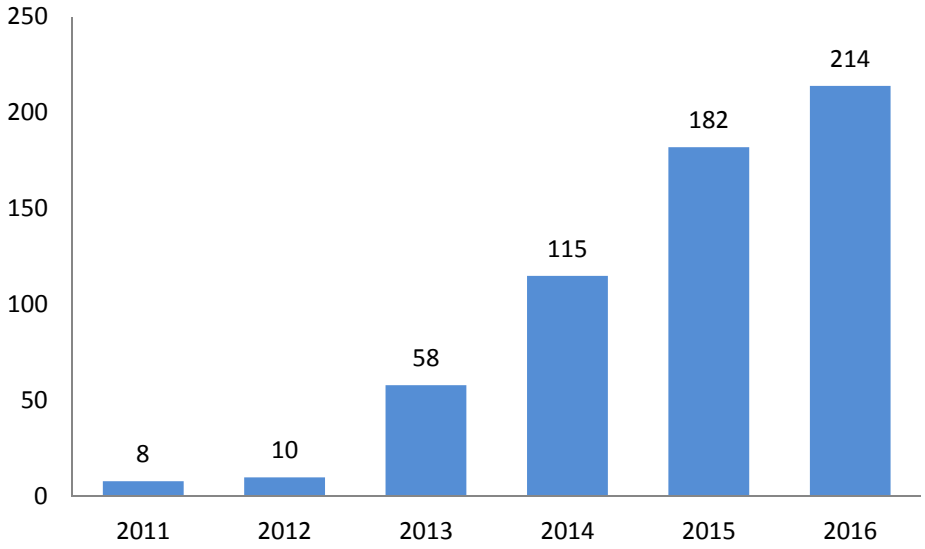
Reinstatement process

5.30 In accordance with s 165 of the *Crimes (Administration of Sentences) Act 1999* (NSW), SPA may, on the offender's application, reinstate a revoked ICO. An offender can apply for reinstatement after serving at least one month in full-time custody.[22] For SPA to make such an order, the offender must again be assessed for suitability for an ICO.[23]

5.31 Figure 5.7 shows the number of instances of an offender having an ICO reinstated in each calendar year, 2011-2016.

22. *Crimes (Administration of Sentences) Act 1999* (NSW) s 165(2).
23. *Crimes (Administration of Sentences) Act 1999* (NSW) s 165(3).

Figure 5.7: Number of instances of an offender having an ICO reinstated, 2011-2016



Source: State Parole Authority, 2017

Conclusion

5.32 Patterns of operation do not appear to have changed significantly over the last year, although the total number of ICOs imposed continues to increase.

5.33 Minor trends observed in 2016 include:

- increases in the percentages of ICOs imposed as a proportion of all penalties in Inner Regional Australia, Outer Regional Australia and Remote Australia
- a resumption in the upward trend of ICOs issued for Indigenous offenders
- a decrease in the proportion of ICOs imposed for Traffic and vehicle regulatory offences and increases in the proportion of ICOs imposed for illicit drug offences and for acts intended to cause injury, and
- a decrease in the proportion of ICOs successfully completed and an increase in the proportion of ICOs revoked.

5.34 In our statutory review we supported the recommendations in the NSW Law Reform Commission report on *Sentencing* which analysed the strengths and weaknesses of ICOs, and proposed changes to strengthen the orders, or introduce more flexible community detention orders.[24]

24. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) Recommendations 9.6 and 11.1-6.

6. Functions and membership of the Council

In brief

We continue to carry out our statutory functions and Council meetings are scheduled on a monthly basis. A number of new appointments and reappointments were made to the Council after 11 positions expired. Staff of the Law Reform and Sentencing Council Secretariat (a division of the Strategy and Policy Branch of the Department of Justice) support our work.

Functions of the Council

6.1 The Sentencing Council has the following functions under s 100J of the *Crimes (Sentencing Procedure) Act 1999* (CSPA):

(a) to advise and consult with the Minister in relation to offences suitable for standard non-parole periods and their proposed length,

(b) to advise and consult with the Minister in relation to:

(i) matters suitable for guideline judgments under Division 4 of Part 3, and

(ii) the submissions to the Court of Criminal Appeal to be made by the Minister in guideline proceedings,

(c) to monitor, and to report annually to the Minister on, sentencing trends and practices, including the operation of standard non-parole periods and guideline judgments,

(d) at the request of the Minister, to prepare research papers or reports on particular subjects in connection with sentencing,

(e) to educate the public about sentencing matters.

6.2 In addition, the Government has also asked us to report annually to the Attorney General on the use of ICOs.[1]

1. NSW, *Parliamentary Debates*, Legislative Council, 22 June 2010, 24426.

Council members

6.3 The CSPA provides that the Sentencing Council is to consist of members with various qualifications.[2]

6.4 The Council's members (and their qualifications) at the end of 2016 are set out below.

Chairperson

The Hon James Wood AO QC	Retired judicial officer

Members

His Honour Acting Judge Paul Cloran	Retired magistrate
Mr Mark Jenkins APM	Member with expertise or experience in law enforcement
Mr Lloyd Babb SC	Member with expertise or experience in criminal law or sentencing – prosecution
Mr Mark Ierace SC	Member with expertise or experience in criminal law or sentencing – defence
Ms Christina Choi	Member with expertise or experience in criminal law or sentencing
Ms Felicity Graham	Member with expertise or experience in criminal law or sentencing
Professor Megan Davis	Member with expertise or experience in Aboriginal justice matters
Mr Howard Brown OAM	Community member - experience in matters associated with victims of crime
Ms Thea Deakin-Greenwood	Community member - experience in matters associated with victims of crime
Associate Professor Tracey Booth	Community member
Ms Moira Magrath	Community member
Mr Peter Severin	Member with expertise or experience in corrective services
Mr Wayne Gleeson	Member with expertise or experience in juvenile justice
Mr Paul McKnight	Representative of the Department of Justice
Professor David Tait	Member with relevant academic or research expertise or experience

6.5 During the course of 2016, 11 appointments to the Council expired.

6.6 The following members were reappointed: Mark Jenkins APM, Lloyd Babb SC, Mark Ierace SC, Professor Megan Davis, Howard Brown OAM, Peter Severin and David Tait.

2. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100I(2).

6.7 The following members were new appointments: Paul McKnight, Felicity Graham, Thea Deakin-Greenwood, and Christina Choi.

6.8 We record with gratitude the service of the following former members: The Hon Anthony Whealy QC; Mr Nicholas Cowdery AM QC; and Mr Ken Marslew AM. Both Mr Cowdery and Mr Marslew were inaugural members of the Council. The Council notes the valuable contribution they have made to the Council's operation through their expertise and commitment. Mr Marslew contributed the important perspective of victims on sentencing and Mr Whealy and Mr Cowdery brought a depth of experience in prosecution and trial work.

Council business

6.9 Council meetings are scheduled on a monthly basis with business being completed at these meetings and out of session.

6.10 During 2016, we received presentations at meetings from:

- Kristen Daglish-Rose, Policy Manager, Domestic and Family Violence, Crime Policy, Justice Strategy and Policy - on initiatives to reduce domestic violence reoffending
- Daniel Noll, Director, Criminal Law Specialist, and Bree Chisholm of Justice Strategy and Policy - on proposals by a working group for 10 offences to be included as table offences
- Sarah Clark, Policy Manager, Offender Strategy, Justice Strategy and Policy Branch on the statutory review of the high risk offenders provisions, and
- Catherine Parker, Director, Strategic Communications, Department of Justice – on options for community education.

6.11 We also provided advice to the Statutory Review of the High Risk Offender provisions.

6.12 We have maintained close working relationships with the Bureau of Crime Statistics and Research, and other parts of the Department of Justice, including: the State Parole Authority; Corrective Services NSW – Sentence Administration; and the NSW Police Force.

Legislative implementation of Sentencing Council recommendations

Criminal Procedure Amendment (Summary Proceedings for Indictable Offences) Act 2016 (NSW)

6.13 In our 2010 report, *An Examination of Sentencing Powers of the Local Court in NSW*, we recommended a general review of the *Crimes Act 1900* (NSW) to determine whether any additional offences should be included in the tables.[3]

3. NSW Sentencing Council, *An Examination of Sentencing Powers of the Local Court in NSW*, Report (2010) 49.

6.14 The Department of Justice undertook the review in close consultation with us and other stakeholders. The Act moves four offences of breaking and entering in company from the category of strictly indictable offences, which must be heard in the District Court, to the category of table offences, which can be heard summarily in the Local Court unless the prosecutor or person charged elects otherwise.[4]

Staffing

6.15 Staff of the Law Reform and Sentencing Council Secretariat (a division of the Strategy and Policy Branch of the Department of Justice) support the work of the Commission.

4. *Criminal Procedure Act 1986* (NSW) sch 1 table 1 cl 8A.