NSW GOVERNMENT Justice
Sentencing Council

Sentencing trends and practices

Annual Report 2017

NSW Sentencing Council

September 2018

www.sentencingcouncil.justice.nsw.gov.au
Phone: 02 8346 1284
Email: sentencingcouncil@justice.nsw.gov.au
GPO Box 31
SYDNEY NSW 2001

Copyright permissions

Disclaimers

Translating and Interpreter Service

If you need an interpreter ring 131 450 and ask the operator to contact us on the above number.

For alternative formats (audio tape, electronic or Braille versions) of this publication contact the NSW Sentencing Council or Diversity Services:

www.justice.nsw.gov.au/diversityservices/Pages/divserv/ds_contactus.aspx

email: diversity.services@justice.nsw.gov.au
phone: 02 8688 7507
fax: 02 8688 9626

ISBN 978-1-922254-35-1

ISSN 1835-5234

Table of contents

Executive summary ..... **v**

1. The Council's projects **1**
Victims' involvement in sentencing 1
Terms of reference 1
Consultation 2

2. Sentencing related research **3**
NSW Bureau of Crime Statistics and Research 3
Indigenous imprisonment in NSW: a closer look at the trend 3
Intensive correction orders versus short prison sentence: a comparison of re-offending 4
Predictive validity of risk/needs assessment for young offenders under community supervision 4
Judicial Commission of NSW 5
Common offences in the NSW Local Court: 2015 5
Transparent and consistent sentencing in the Land and Environment Court of NSW: orders for costs as an aspect of punishment 8
Royal Commission into Institutional Responses to Child Sexual Abuse 9
Sentencing 9
Restorative justice 10

3. Operation of guideline judgments **13**
High-range prescribed concentration of alcohol 15
Taking matters into account on Form 1 16
Break, enter and commit an offence 17
Armed robbery 18
Sentencing discount for guilty plea 19
Dangerous driving 20

4. Cases of interest **21**
Evidence of consent of underage victim of sexual intercourse 21
Relevance of offender's mental condition 22
Effect of sentence on offender's family – exceptional circumstances 22
Historic offences with a varying history of legislative penalties 23
Aggravation where offence takes place in home of the victim 24
Relevance of gambling addiction 24
Effect of compensation directions in mitigation of sentence 25
Evidence of remorse 26
Good character in the context of domestic violence 27
Use of evidence of good character in historic child sexual offences 28
Suspending aggregate sentences 28
Conspiracy to do acts in preparation for a terrorist act 29
Impact of sentence on offender's family and children 30
Sentencing for any substantial degree of drug trafficking 30
Circumstances of sexual assault and objective seriousness 31

Objective seriousness for SNPP offences 31
Taking current sentencing practice into consideration 32

5. Review of intensive correction orders 35
Background 36
Overview of ICOs 36
Use of ICOs 37
Regional use of ICOs 40
Indigenous status 42
ICO sentence lengths 43
ICO suitability assessments 44
Offence characteristics 45
Discharges 47
Breach information 47
Breach process 47
Breach rates 48
Conclusion 49

6. Functions and membership of the Council 51
Functions of the Council 51
Council members 52
Council business 53
Communications 53
Staffing 53

Executive summary

0.1 The purpose of this report is to detail the projects the NSW Sentencing Council undertook in the 2017 calendar year, as well as provide an overview of notable sentencing research, case law and trends during the same period. This report fulfils the Council's statutory obligation to "monitor, and to report annually to the Minister on, sentencing trends and practices" (*Crimes (Sentencing Procedure) Act 1999* (NSW) s 100J(1)(c)).

The Council's projects (Chapter 1)

0.2 We worked on one project in 2017:

- **Victims' involvement in sentencing:** reference received 24 May 2017; consultation paper published September 2017.

Sentencing related research (Chapter 2)

0.3 Sentencing related research conducted by the NSW Bureau of Crime Statistics and Research in 2017 included:

- Indigenous imprisonment in NSW: A closer look at the trend – *Bureau Brief No 126* (November 2017).
- Intensive correction orders versus short prison sentence: A comparison of re-offending – *Crime and Justice Bulletin No 207* (October 2017).
- Predictive validity of risk/needs assessment for young offenders under community supervision – *Crime and Justice Bulletin No 205* (June 2017).

0.4 Sentencing related research conducted by the Judicial Commission of NSW in 2017 included:

- Common offences in the NSW Local Court: 2015 – *Sentencing Trends and Issues No 46* (May 2017).
- Transparent and consistent sentencing in the Land and Environment Court of NSW: orders for costs as an aspect of punishment – *Research Monograph 40* (2017).

0.5 The Royal Commission into Institutional Responses to Child Sexual Abuse, in its Criminal Justice Report considered:

- Sentencing (Chapter 34 of the *Criminal Justice Report*), and
- Restorative justice ([2.6.1] of the *Criminal Justice Report*).

Operation of guideline judgments (Chapter 3)

0.6 The higher ~~courts~~ considered or cited guideline judgments in 53 matters

Cases of interest (Chapter 4)

0.7 In 2017, the Supreme Court and appellate courts delivered judgments of interest on the following sentencing topics:

- Evidence of consent of underage victim of sexual intercourse – *CT v R* [2017] NSWCCA 15
- Relevance of offender's mental condition – *Kearsley v R* [2017] NSWCCA 28
- Effect of sentence on offender's family – exceptional circumstances – *Costello v R* [2017] NSWCCA 32
- Historic offences with a varying history of legislative penalties – *Woodward v R* [2017] NSWCCA 44
- Aggravation where offence takes place in home of the victim – *Chung v R* [2017] NSWCCA 48
- Relevance of gambling addiction – *Johnston v R* [2017] NSWCCA 53
- Effect of compensation directions in mitigation of sentence – *Upadhyaya v R* [2017] NSWCCA 162
- Evidence of remorse – *Imbornone v R* [2017] NSWCCA 144
- Good character in the context of domestic violence – *R v Villaluna* [2017] NSWSC 1390
- Use of evidence of good character in historic child sexual offences – *Stanton v R* [2017] NSWCCA 250
- Suspending aggregate sentences - *DPP v Shillingsworth* [2017] NSWCCA 224
- Conspiracy to do acts in preparation for a terrorist act – *R v Khalid* [2017] NSWSC 1365
- Impact of sentence on offender's family and children – *R v Martin* [2017] NSWSC 1498
- Sentencing for any substantial degree of drug trafficking – *Parente v R* [2017] NSWCCA 284
- Circumstances of sexual assault and objective seriousness – *Armstrong v R* [2017] NSWCCA 323
- Objective seriousness for SNPP offences – *Yun v R* [2017] NSWCCA 317
- Taking current sentencing practice into consideration - *DPP (Vic) v Dalgliesh* [2017] HCA 41; 91 ALJR 1063

Review of intensive correction orders (Chapter 5)

0.8 Since 2011 there has been moderate growth each year in the number of offenders sentenced to an intensive correction order (ICO). In 2017:

- 2166 offenders were sentenced to ICOs

- 1.4% 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.

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

- decreases in the percentages of ICOs imposed as a proportion of all penalties in Outer Regional Australia and Remote Australia
- a continuing decrease in the proportion of ICOs imposed for traffic and vehicle regulatory offences and a continuing increase in the proportion of ICOs imposed for illicit drug offences, and
- a continuing decrease in the proportion of ICOs successfully completed and a continuing increase in the proportion of ICOs revoked.

Functions and membership of the Council (Chapter 6)

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

0.11 Three members of the Council were reappointed after their terms expired in the course of 2017: Associate Professor Tracey Booth, Wayne Gleeson and Moira Magrath.

0.12 We have maintained close working relationships with the Bureau of Crime Statistics and Research, and other parts of the Department of Justice, including Corrective Services NSW – Sentence Administration.

0.13 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 one project in 2017 – Victims' involvement in sentencing.

We released a consultation paper and conducted consultations as part of this project.

Victims' involvement in sentencing 1
Terms of reference 1
Consultation 1

Victims' involvement in sentencing

Terms of reference

1.1 On 24 May 2017, the NSW Attorney General, the Hon Mark Speakman SC MP, requested that the Council conduct a review of victims' involvement in the sentencing process under the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("the Act") and consider:

1. The principles courts apply when receiving and addressing victim impact statements.
2. Who can make a victim impact statement.
3. Procedural issues with the making and reception in court of a victim impact statement, including the content of a victim impact statement, the evidential admissibility applied to a victim impact statement, and objections to the content of victim impact statements.
4. The level of support and assistance available to victims.

1.2 In undertaking the review, the Attorney General requested that the Council should have regard to:

- The obligations arising under section 107 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).
- The effect of the current framework on victims.
- Developments in other jurisdictions both in Australia and overseas.
- Minimising victim distress in sentencing.

1.3 Section 107 of the Act required the Attorney General to undertake a statutory review of the effect of amendments that were made in 2014 regarding victim impact statements ("VIS") given by family victims. This review was to be completed by 1 July 2018. The Council was asked to report by early 2018 so that our review could inform the statutory review.

Consultation

1.4 We called for preliminary submissions on the terms of reference in June 2017 and received 17 preliminary submissions, which helped identify issues for a consultation paper. The preliminary submissions are published on our website.

1.5 We released the consultation paper in September 2017 covering a variety of topics relating to victims' involvement in sentencing; in particular, the practices and procedures surrounding victim impact statements. We received 22 submissions addressing the questions raised. The submissions are published on our website.

1.6 We also conducted two roundtable consultations in late November 2017 with stakeholders with experience of the operation of VISs in the District Court and the Local Court.

2. Sentencing related research

In brief

This chapter summarises notable sentencing related research conducted in 2017. This includes research by the NSW Bureau of Crime Statistics and Research, the Judicial Commission of NSW and the Royal Commission into Institutional Responses to Child Sexual Abuse.

NSW Bureau of Crime Statistics and Research 3
Indigenous imprisonment in NSW: a closer look at the trend 3
Intensive correction orders versus short prison sentence: a comparison of re-offending 4
Predictive validity of risk/needs assessment for young offenders under community supervision 4
Judicial Commission of NSW 5
Common offences in the NSW Local Court: 2015 5
Transparent and consistent sentencing in the Land and Environment Court of NSW: orders for costs as an aspect of punishment 8
Royal Commission into Institutional Responses to Child Sexual Abuse 9
Sentencing 9
Restorative justice 10

NSW Bureau of Crime Statistics and Research

Indigenous imprisonment in NSW: a closer look at the trend

NSW Bureau of Crime Statistics and Research, Bureau Brief, No 126 (November 2017)

2.1 This study sought to explain the upward trend in Indigenous imprisonment in NSW between 2012 and 2016. Between 2013 and 2016 the NSW Indigenous imprisonment rate increased by 25%. The Indigenous imprisonment rate is now 13.5 times higher than the non-indigenous imprisonment rate.

2.2 The researchers analysed the factors influencing the number of remand and sentenced prisoners taken into custody and the length of time spent in custody by remandees and sentenced prisoners. The trends were then tested for significance.

2.3 This study found that the growth in Indigenous imprisonment since 2012 is the result of increases in:

(1) the proportion of Indigenous defendants refused bail,

(2) the number of Indigenous defendants convicted of criminal offences, especially those in the categories of stalking/intimidation, breaching an apprehended violence order ("AVO"), breaching a s 9 bond (a good behaviour bond), and breaching a s 12 bond (suspended sentence),

(3) the proportion of convicted Indigenous offenders receiving a prison sentence for the offence of stalking/intimidation, and

(4) the time spent on remand by Indigenous defendants refused bail (in large part due to increased delays in the District Court).

2.4 The study concluded that the number of Indigenous offenders receiving a prison sentence could be reduced by more than 700 per year if half of those currently given short prison sentences for assault occasioning actual bodily harm, common assault, stalking/intimidation, breaching an AVO, breaching a s 9 bond or breaching a s 12 bond were placed instead on an intensive correction order ("ICO") or home detention.

Intensive correction orders versus short prison sentence: a comparison of re-offending

NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin No 207 (October 2017)

2.5 This study compared re-offending rates between those who received an ICO and those who received a short prison sentence (less than two years). The data was drawn from the BOSCAR Re-offending Database.

2.6 An ICO is an alternative to a full-time custodial sentence. A court can only impose an ICO if it has already decided to impose a prison sentence of no more than two years (which will not be suspended). Corrective Services NSW ("CSNSW") must also assess the offender as suitable for an ICO, based on factors such as the offender's age and criminal history and any risk associated with managing the offender in the community.

2.7 Offenders subject to an ICO must comply with three mandatory conditions:

- completion of a minimum of 32 hours of work supervised by CSNSW
- participation in programs as directed by CSNSW, and
- drug and alcohol testing on work and program sites.

2.8 Employing logistic regression models and a variety of statistical methodologies, in particular propensity score matching, the study found that there was an 11-31% reduction in the probability of re-offending for an offender who received an ICO compared with an offender who received a prison sentence of up to 2 years. This reinforces the evidence indicating that supervision combined with rehabilitation programs can have a considerable impact on recidivism rates.

Predictive validity of risk/needs assessment for young offenders under community supervision

NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin No 205 (June 2017)

2.9 This study looked at whether risk/needs data from the Australian Adaptation of the Youth Level of Service/Case Management Inventory ("YLS/CMI-AA") improve recidivism prediction for young offenders under community supervision, when compared with static risk data from BOCSAR's Re-offending Database.

2.10 The YLS/CMI-AA is a risk/needs assessment and case management tool that is administered to all young offenders in NSW issued with a supervised order. It incorporates unmodifiable or "static" factors (such as criminal history) and modifiable or "dynamic" factors (such as peer relations) that are linked with recidivism. The result is a detailed evaluation of risk and need that can inform the level and types of interventions that offenders need.

2.11 The YLS/CMI-AA is based on three key principles:

- **risk** (treatment level should increase with recidivism risk level)
- **need** (treatment type should be matched to individual criminogenic needs), and
- **responsivity** (the style and method of treatment should match the individual characteristics of the client).

2.12 The Re-Offending Database contains records of all offences since 1994 and custodial episodes since 2000. Offence history and custodial history are static risk factors that can inform decisions about supervision intensity but cannot inform case planning or risk reduction.

2.13 The study sample included all 1,050 young offenders who commenced a supervised community order in 2014 with a valid YLS/CMI-AA and Re-offending Database record.

2.14 The study employed logistic regression to assess the individual and collective relationships to recidivism of static risk factors and YLS/CMI-AA scores. It was found that YLS/CMI-AA data did not significantly improve the predictive accuracy of static risk-based models of recidivism for Indigenous or non-Indigenous offenders. Furthermore, the authors note that the results cannot be generalised beyond the current sample, as it was restricted to offenders with a valid YLS/CMI-AA.

2.15 Although the findings suggest that YLS-CMI-AA data do not significantly improve predictive accuracy of static risk-based models of recidivism, the study concludes that dynamic risk factors still have value. Factors such as education and peer relations provide information that is essential in analysing the causes of offending behaviour and identifying an appropriate form of intervention.

Judicial Commission of NSW

Common offences in the NSW Local Court: 2015

Judicial Commission of NSW, Sentencing Trends and Issues No 46 (May 2017)

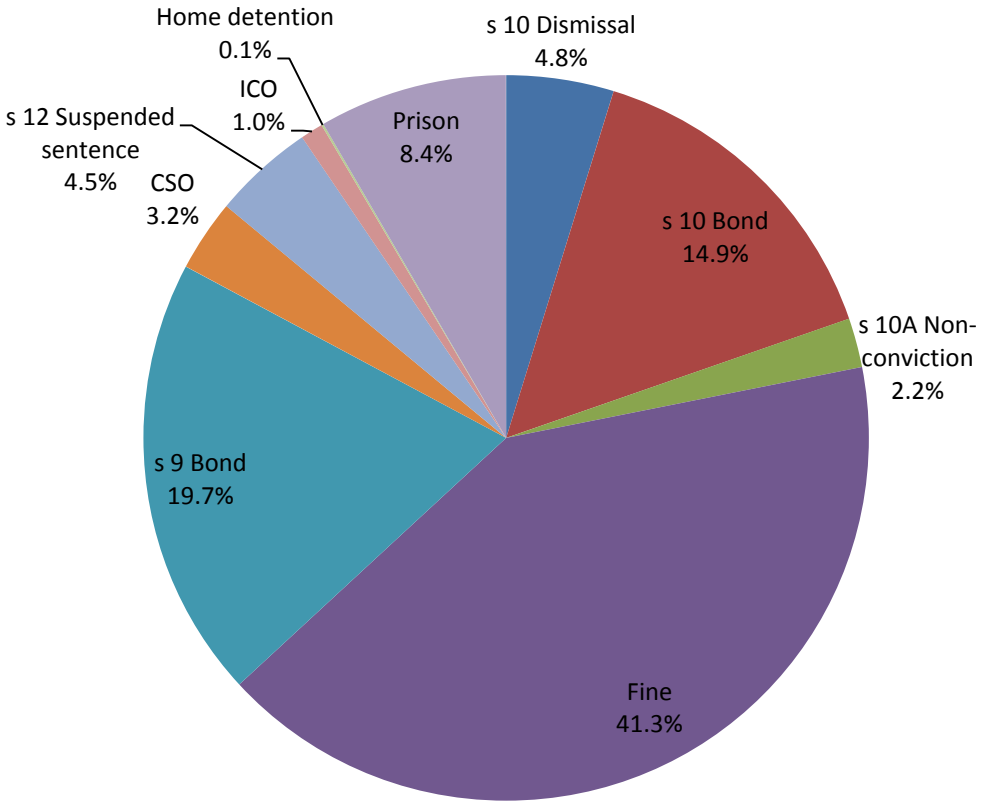
2.16 This study analysed sentencing data from the JusticeLink System to identify the most common offences dealt with by the Local Court in 2015 and the sentences imposed. In 2015, the Local Court sentenced 120,288 offenders for 217,185 offences.

2.17 In relation to penalties for principal offences (the offences which attract the highest penalties in terms of type and quantum of sentence), the study observed that the three most common penalties were:

- Fines (imposed on 41.3% of offenders – with a median fine of $500)

- Section 9 bonds (imposed on 19.7% of offenders), and
- Dismissals and discharges without conviction under s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (imposed on 19.7% of offenders).

Figure 2.1: Penalties imposed by the Local Court of NSW, 2015



2.18 The study also observed:

- The rate of full-time imprisonment has increased since 2010.
- ICOs were imposed in 1% of cases.

Table 2.1: Most common proven statutory offences (principal offence only) sentenced in the NSW Local Court in 2015

Rank 2015	Rank 2010	Offence description	Legislation	Number of cases	% of cases
1	4	Possess prohibited drug	*Drug Misuse and Trafficking Act* 1985, s 10(1)	10,414	9.9
2	1	Mid-range PCA	*Road Transport Act* 2013, s 110(4)[a]	7.085	6.7
3	2	Common assault	*Crimes Act* 1900, s 61	6,868	6.5
4	3	Low-range PCA	*Road Transport Act* 2013, s 110(3)[b]	6,338	6.0
5	–	Drive with presence of prescribed illicit drug	*Road Transport Act* 2013, s 111(1)[c]	4,952	4.7

Rank 2015	Rank 2010	Offence description	Legislation	Number of cases	% of cases
6	5	Drive while disqualified	*Road Transport Act* 2013, s 54(1)(a)[d]	4,917	4.7
7	8	Knowingly contravene AVO	*Crimes (Domestic and Personal Violence) Act* 2007, s 14(1)	4,023	3.8
8	6	Assault occasioning actual bodily harm	*Crimes Act* 1900, s 59(1)	4,002	3.8
9	13	Stalk or intimidate with intent to cause fear of physical or mental harm	*Crimes (Domestic and Personal Violence) Act* 2007, s 13(1)	3,904	3.7
10	10	Larceny	*Crimes Act* 1900, s 117	3,584	3.4
11	7	Drive while suspended	*Road Transport Act 2013*, s 54(3)(a)[e]	3,311	3.1
12	9	Destroy or damage property	*Crimes Act* 1900, s 195(1)(a)	3,126	3.0
13	11	High-range PCA	*Road Transport Act* 2013, s 110(5)[f]	2,717	2.6
14	12	Never licensed person drive on road	*Road Transport Act* 2013, s 53(3)[g]	2,555	2.4
15	19	Goods in custody	*Crimes Act* 1900, s 527C(1)	1,897	1.8
16	18	Drive while suspended under s 66 of the *Fines Act* 1996	*Road Transport Act* 2013, s 54(5)(a)(i)[h]	1,810	1.7
17	15	Drive without being licensed	*Road Transport Act* 2013, s 53(1)(a)[i]	1,587	1.5
18	14	Assault with intent on certain officers	*Crimes Act* 1900, s 58	1,569	1.5
19	–	Fraud	*Crimes Act* 1900, s 192E(1)[j]	1,397	1.3
20	20	Special-range PCA	*Road Transport Act* 2013, s 110(2)[k]	1,004	1.0
			Total for top 20 statutory offences	77,060	73.2
			All remaining statutory offences	28,184	26.8
			Total number of cases	105,244	100.0

Source: Judicial Commission of NSW

2.19 The study found that for the 20 most common statutory principal offences in the Local Court there continues to be a high rate of non-custodial sentences, including for stalking/intimidation and assault occasioning actual bodily harm ("ABH").

2.20 The study also made several observations about sentencing patterns and severity in 2015:

- Median fine amounts increased from 2010 for all offences except high-range drink driving.
- The offences of stalking or intimidation, common assault, assault occasioning ABH and assault with intent on certain officers received the highest rates of s 9 bonds.

- For the majority of offences for which a term of imprisonment was available, either the median full-term or median non-parole period/fixed term of full-time imprisonment for a principal offence increased from 2010.

2.21 Additionally, the study identified several sentencing patterns for all proven offences, including the following:

- Offenders with only one offence received more lenient sentences compared with other groups of offenders, whereas offenders with multiple offences received harsher penalties, particularly where they were also being sentenced for at least one more serious offence.
- The use of s 10A convictions (a conviction with no further penalty) as a method of disposing of secondary offences was evident, especially for offences that attract a high rate of fines.

2.22 The study concluded that the findings overall demonstrate that sentencing is a complex and multifaceted exercise. Penalties imposed for individual offences are influenced by the seriousness of offence, whether it is committed alongside other offences, and whether the totality principle applies. The totality principle requires a court sentencing an offender for multiple offences to ensure that the overall sentence is "just and appropriate" and reflects the totality of the conduct involved in the various offences.

Transparent and consistent sentencing in the Land and Environment Court of NSW: orders for costs as an aspect of punishment

Judicial Commission of NSW, Research Monograph 40 (2017)

2.23 This study sought to analyse sentencing practices in the NSW Land and Environment Court ("LEC") between 2000 and 2015. The data was drawn from the environmental sentencing database developed by the Judicial Commission of NSW in collaboration with the LEC.

2.24 The study drew upon quantitative materials with respect to penalties and more detailed case-by-case qualitative information. The investigation identified several areas of sentencing practice in the LEC which may require review or reform to increase transparency and consistency in sentencing.

2.25 The most critical issue it identified related to costs. Despite costs being an "aspect of punishment", they are typically "as agreed or assessed" and judges are not required to specify the amount of costs at sentence. It was the authors' view that the court should know all the costs to be paid by the offender at the time of sentencing and record them as part of the judgment.

2.26 The authors argued that the current arrangement hinders the LEC's ability to achieve "individualised justice" in sentencing. The court is unable to compare sentences imposed in similar cases where the costs figure is not known. If costs are not identified, the imposition of what may be perceived as a "low" level fine may give a false impression of how the LEC punishes environmental offenders.

2.27 The study suggests that a review and reform of the laws relating to costs orders in the LEC could lead to greater clarity and uniformity in sentencing.

Royal Commission into Institutional Responses to Child Sexual Abuse

Sentencing

Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report (2017) Chapter 34

2.28 The Royal Commission into Institutional Responses to Child Sexual Abuse ("the Royal Commission") commissioned research that resulted in two reports:

- *Sentencing for child sexual abuse in institutional contexts* ("Sentencing Research") by Emeritus Professor Arie Freiberg, Mr Hugh Donnelly and Dr Karen Gelb, and
- A statistical analysis of sentencing for child sexual abuse in institutional contexts ("Sentencing Data Study") by Dr Karen Gelb.

2.29 In Chapter 34 of the Criminal Justice Report, the Royal Commission outlined the findings from this research.

2.30 The Sentencing Research examined issues such as community perceptions of sentencing, the sentencing factors considered by courts, and the possibility of institutional-specific offences.

2.31 The research identified several aggravating factors that sentencing courts consider, including the following:

- premeditation
- a breach or abuse of trust or authority that enabled offending
- the exploitation of an offender's "good" standing, and
- the delay between the offending and the sentencing date, if the delay negatively affected the victim or survivor.

2.32 Additionally, the research identified that sentences may be reduced for reasons such as:

- the consequences of conviction for the offender where they are of old age or poor health
- a consideration of the sentencing practices at the time of the offending, and
- the offender's "assistance to justice" – for instance, by confessing to other offences.

2.33 The Sentencing Data Study expanded the database of institutional child sexual abuse cases analysed in the research to include 283 cases. The key observations of the Sentencing Data study include the following:

- The majority of offenders received a sentence of imprisonment.
- The median delay from offence to sentence was 25 years.

- In over half of the cases, the offender had no prior criminal record.
- There was more than one victim in just over 58% of all matters.
- The likelihood of receiving a custodial term was predicted by three variables: the presence of grooming, a high number of offences, and offence type.
- The period in which a case was sentenced had a significant impact on the type of penalty imposed.

2.34 In light of these findings and the submissions received, the Royal Commission made the following recommendations:

- That other Australian jurisdictions should adopt the position that applies in New South Wales and South Australia concerning the use of good character evidence. In these states, good character is excluded as a mitigating factor in sentencing for child sexual abuse offences where that good character facilitated the offending.
- That state and territory governments introduce legislation to require sentencing courts, when determining a sentence in relation to child sexual abuse offences involving multiple separate episodes of offending, and/or where there are multiple victims, to indicate the sentence that would have been imposed for each offence, had separate sentences been issued.
- That state and territory governments introduce legislation to provide that sentences for child sexual abuse offences be determined in accordance with the sentencing standards at the time of sentencing, instead of at the time of offending. However, the sentence must be limited to the maximum sentence available for the offence at the time of offending.

2.35 We will report any legislative action in NSW in response to the Royal Commission's recommendations in future annual reports.

Restorative justice

Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report (2017) [2.6.1]

2.36 The Royal Commission also considered the possibility of restorative justice responses to institutional child sexual abuse. "Restorative justice" was described as a range of approaches to address harm generally involving an offender admitting they caused harm and then engaging in dialogue with those directly affected to help meet the needs of victims and others affected by the offending behaviour. Such approaches could be used as an adjunct to criminal justice processes (including sentencing) or, in some cases, instead of them.

2.37 Some stakeholders to the Royal Commission argued for restorative justice approaches in connection with, or instead of, traditional criminal justice responses to institutional child sexual abuse.

2.38 The Royal Commission commissioned a literature review to assess the evidence base for the use of restorative justice responses to cases of child sexual abuse, particularly non-familial child sexual abuse. The review identified 15 restorative justice programs with a variety aims including reducing reoffending, addressing victim needs and strengthening communities. This variety made it difficult to

evaluate the success of a program. Of the 30 studies evaluating the programs, only three reported mixed or negative findings. However, none of the programs used restorative justice approaches to address institutional child sexual abuse.

2.39 The Commission observed that the following reasons may explain why restorative justice programs are not used to respond to institutional child sexual abuse:

- the power dynamics and seriousness of institutional child sexual abuse offending
- many survivors would not seek a restorative justice outcome with the perpetrator
- many perpetrators may be unavailable to participate because of delays in reporting.

2.40 The Commission noted that considerations may be different when dealing with young offenders and that there were some programs that offered restorative justice in cases of young offenders. However, based on current evidence, the Commission was "not satisfied that formal restorative justice approaches should be included as part of the criminal justice response to institutional child sexual abuse, at least in relation to adult offenders".[1]

1. Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) 189.

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

High-range prescribed content of alcohol....15
Taking matters into account on Form 1....16
Break, enter and commit an offence....17
Armed robbery....18
Sentencing discount for guilty plea....19
Dangerous driving....20

3.1 Guideline judgments are judgments that contain guidelines that courts are to take into account when sentencing offenders.

3.2 The Court of Criminal Appeal ("CCA") delivered the first guideline judgment in NSW of its own motion (following precedent established in England and Wales) in 1998.[1]

3.3 In 2001, the High Court questioned whether the CCA had jurisdiction under the *Criminal Appeal Act 1912* (NSW) to issue guideline judgments on its own motion.[2] In response to this decision, guideline judgments were given a legislative base and retrospective validity was given to the previously issued guidelines.

3.4 Part 3 Division 4 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) now governs guideline judgments. It allows the CCA to issue guideline judgments on the application of the Attorney General or on its own motion, and to review or vary those judgments.[3] Guidelines can apply generally, or to particular courts or classes of courts, or particular offences or classes of offences, or particular penalties or classes of penalties, or to particular classes of offenders.[4]

3.5 Guideline judgments have tended to take one of two forms:

- those that are numerical and state a range of appropriate sentences;[5] and
- those that are qualitative and define the relevant factors to be taken into account[6] (an approach adopted where there is a significant diversity in the circumstances in which the offence can be committed).

3.6 The courts have made it clear that while, courts are to "take into account" guidelines when sentencing an offender,[7] they operate as a "check", or "sounding board", and

1. *R v Jurisic* (1998) 45 NSWLR 209. See *R v De Havilland* (1993) 5 CrAppR (S) 109, 114.
2. *Wong v R* [2001] HCA 64; 207 CLR 584.
3. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 37, s 37A, s 37B.
4. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 36.
5. See, eg, *R v Whyte* [2002] NSWCCA 343; 55 NSWLR 252.
6. See, eg, *R v Ponfield* [1999] NSWCCA 435; 48 NSWLR 327.
7. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 36.

not as a "rule" or "presumption".[8] However, where a guideline is not applied, it is expected that reasons would be stated:

> so that the public interest in the perception of consistency in sentencing decisions can be served and this Court can be properly informed in the exercise of its appellate jurisdiction.[9]

3.7 Guideline judgments have been handed down in relation to dangerous driving,[10] armed robbery;[11] break, enter and commit an offence;[12] guilty pleas;[13] taking further offences into account;[14] and driving with a high range prescribed concentration of alcohol (PCA).[15]

3.8 The Judicial Commission of NSW has evaluated the impact of three of the guideline judgments. In each case, it found significant effects on penalty levels (mostly involving increases in penalties) as well as indications of improved consistency.[16]

3.9 The tables below show the consideration that the NSW Court of Criminal Appeal and Supreme Court have given to the guideline judgments during 2017.

8. *R v Whyte* [2002] NSWCCA 343; 55 NSWLR 252 [113].
9. *R v Whyte* [2002] NSWCCA 343; 55 NSWLR 252 [73], [114].
10. *R v Whyte* [2002] NSWCCA 343; 55 NSWLR 252 reformulating *R v Jurisic* (1998) 45 NSWLR 209.
11. *R v Henry* [1999] NSWCCA 111; 46 NSWLR 346.
12. *R v Ponfield* [1999] NSWCCA 435; 48 NSWLR 327.
13. *R v Thomson* [2000] NSWCCA 309; 49 NSWLR 383.
14. *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (No 1 of 2002)* [2002] NSWCCA 518; 56 NSWLR 146.
15. *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (No 3 of 2002)* [2004] NSWCCA 303, 61 NSWLR 305.
16. L Barnes, P Poletti and I Potas, *Sentencing Dangerous Drivers in New South Wales: Impact of the Jurisic Guidelines on Sentencing Practice*, Research Monograph No 21 (Judicial Commission of NSW, 2002); P Poletti, *Impact of the High Range PCA Guideline Judgment on Sentencing Drink Drivers in NSW*, Sentencing Trends and Issues No 35 (Judicial Commission of NSW, 2005); L Barnes and P Poletti, *Sentencing Robbery Offenders since the Henry Guideline Judgment*, Research Monograph No 30 (Judicial Commission of NSW, 2007).

High-range prescribed concentration of alcohol

3.10 This guideline judgment is about the offence of driving with a high range prescribed concentration of alcohol under s 9(4) of the *Road Transport (Safety and Traffic Management) Act 1999* (NSW). Section 9(4) has since been repealed and replaced by s 110(5) of the *Road Transport Act 2013* (NSW). A high range prescribed concentration of alcohol is set at 0.15 grams or more of alcohol in 210 litres of breath or 100 millilitres of blood.[17]

Table 3.1: High-range prescribed concentration of alcohol

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 2017	0	Total in 2016	0

17. *Road Transport Act 2013* (NSW) s 108.

Taking matters into account on Form 1

3.11 This guideline judgment is about sentencing for an offence where the prosecutor has filed a list of offences that have been charged but not convicted and which the offender wants the court to take into account in sentencing.[18] The offences that the court takes into account are commonly said to be listed on "Form 1".

Table 3.2: 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	*Le v R* [2017] NSWCCA 26		
Considered	*DG v R* [2017] NSWCCA 139 *Laycock v R* [2017] NSWCCA 47		
Cited	*Kassoua v R* [2017] NSWCCA 307 *Ristovski v R* [2017] NSWCCA 285 *Kurniawan v R* [2017] NSWCCA 171 *Amiri v R* [2017] NSWCCA 157 *Amiri v R* [2017] NSWSC 847 *R v Qaumi* [2017] NSWSC 774 *Hurst v R* [2017] NSWCCA 114 *Fayad v R* [2017] NSWCCA 81 *Wilson v R* [2017] NSWCCA 41		
Total in 2017	12	Total in 2016	16

18. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 3 div 3.

Break, enter and commit an offence

3.12 This guideline judgment deals with sentencing for the offence of breaking, entering and committing a felony under s 112(1) of the *Crimes Act 1900* (NSW). The provision has since been amended in various ways, but most relevantly the reference to "any felony" has been replaced by "any serious indictable offence" which is defined as "an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more".[19]

Table 3.3: Break, enter and commit an offence

Guideline judgment	*R v Ponfield* [1999] NSWCCA 435; 48 NSWLR 327.		
Applied	*TL v R* [2017] NSWCCA 308		
Cited	*Harris v R* [2017] NSWCCA 254 *See v R* [2017] NSWCCA 165		
Total in 2017	3	Total in 2016	7

19. *Crimes Act 1900* (NSW) s 4(1) definition of "serious indictable offence".

Armed robbery

3.13 This guideline judgment deals with sentencing for the offences of armed robbery and aggravated armed robbery under s 97 of the *Crimes Act 1900* (NSW).

Table 3.4: Armed robbery

Guideline judgment	*R v Henry* [1999] NSWCCA 111; 46 NSWLR 346.		
Applied	*Buxton v R* [2017] NSWCCA 169 *Liu v R* [2017] NSWCCA 148 *IS v R* [2017] NSWCCA 116 *Owens v R* [2017] NSWCCA 16		
Considered	*Yun v R* [2017] NSWCCA 317 *O'Connor v R* [2017] NSWCCA 300 *R v Kijurina* [2017] NSWCCA 117 *Kelly v R* [2017] NSWCCA 82 *Johnston v R* [2017] NSWCCA 53		
Cited	*Ohanian v R* [2017] NSWCCA 268 *Egan v R* [2017] NSWCCA 206 *R v Jafari* [2017] NSWCCA 152 *Cherry v R* [2017] NSWCCA 150 *R v Rhodes* [2017] NSWSC 694 *Dowling v R* [2017] NSWCCA 98 *R v Fang (No 4)* [2017] NSWSC 323		
Total in 2017	16	Total in 2016	27

Sentencing discount for guilty plea

3.14 This guideline judgment is about sentencing when an offender has pleaded guilty. When the judgment was handed down, s 22 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) governed what a court must take into account when an offender pleaded guilty for all offences. Indictable offences, where the offender pleads guilty, are now (since 30 April 2018) dealt with in accordance with Part 3 Division 1A of the *Crimes (Sentencing Procedure) Act 1999* (NSW).[20]

Table 3.5: Sentencing discount for guilty plea

Guideline judgment	*R v Thomson* [2000] NSWCCA 309; 49 NSWLR 383		
Considered	*Samuel v R* [2017] NSWCCA 239 *Edwards v R* [2017] NSWCCA 160*R v Rhodes* [2017] NSWSC 694 *Nash v Silver City Drilling (NSW) Pty Ltd* [2017] NSWCCA 96		
Cited	*Dyno Nobel Asia Pacific Pty Ltd v Environment Protection Authority* [2017] NSWCCA 302 *Merrick v R* [2017] NSWCCA 264 *Murray v R* [2017] NSWCCA 262 *R v Martin* [2017] NSWSC 1498 *Faehringer v R* [2017] NSWCCA 248 *Roff v R* [2017] NSWCCA 208 *PG v R* [2017] NSWCCA 179 *Smith v R* [2017] NSWCCA 175 *Buxton v R* [2017] NSWCCA 169 *Prothonotary of Supreme Court of New South Wales v Coren* [2017] NSWSC 754 *Al Saadi v R* [2017] NSWCCA 110 *R v Ghazzawy* [2017] NSWSC 474 *Prothonotary of Supreme Court of NSW v A* [2017] NSWSC 495 *Linggo v R* [2017] NSWCCA 67 *DH v R* [2017] NSWCCA 64 *R v Stocco* [2017] NSWSC 304 *R v Hadchiti* [2017] NSWSC 292		
Total in 2017	21	Total in 2016	25

20. Inserted by *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (NSW) sch 2 cl 4.

Dangerous driving

3.15 This guideline judgment is about sentencing for the offence of dangerous driving under s 52A of the *Crimes Act 1900* (NSW). It reformulates an earlier guideline judgment on the same subject[21] following amendments made to the guideline judgment provisions in light of the High Court's decision in *Wong v R*.[22]

Table 3.6: Dangerous driving

Guideline judgment	*R v Whyte* [2002] NSWCCA 343; 55 NSWLR 252 reformulating *R v Jurisic* (1998) 45 NSWLR 209		
Considered	*R v Manok* [2017] NSWCCA 232		
Total in 2017	1	Total in 2016	9

21. *R v Jurisic* (1998) 45 NSWLR 209.
22. *Wong v R* [2001] HCA 64; 207 CLR 584.

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.

Evidence of consent of underage victim of sexual intercourse 21
Relevance of offender's mental condition 22
Effect of sentence on offender's family – exceptional circumstances 22
Historic offences with a varying history of legislative penalties 23
Aggravation where offence takes place in home of the victim 24
Relevance of gambling addiction 24
Effect of compensation directions in mitigation of sentence 25
Evidence of remorse 26
Good character in the context of domestic violence 27
Use of evidence of good character in historic child sexual offences 28
Whether aggregate sentences can be suspended 28
Conspiracy to do acts in preparation for a terrorist act 29
Impact of sentence on offender's family and children 30
Sentencing for any substantial degree of drug trafficking 30
Circumstances of sexual assault and objective seriousness 31
Objective seriousness for SNPP offences 31
Taking current sentencing practice into consideration 32

Evidence of consent of underage victim of sexual intercourse

CT v R [2017] NSWCCA 15

4.1 The offender (the de facto partner of the victim's mother) appealed against sentence for 7 historic sex offences against a victim who was aged 6-10 years. One ground of appeal was that the sentencing judge erred in failing to mention or take into account an objective fact - evidence of the complainant that she continued having sex with the applicant because she enjoyed it. The CCA rejected this "bold" submission, observing that:

> There is no authority for it with good reason. It is quite inappropriate to equate a child's appreciation of a sexual experience with that of a mature adult. Moreover, it is obvious from the complainant's evidence that although she may have experienced some physical pleasure, she was also experiencing feelings of guilt and an increasing appreciation of the wrongness of what was happening. It is clear from the complainant's victim impact statement that the emotional and psychological scarring brought about by this offending has remained with her and will remain with her for the rest of her life.[1]

1. *CT v R* [2017] NSWCCA 15 [71].

4.2 The Court also affirmed previous authority highlighting the breach of trust in such cases and the policy behind deeming people of young age to be unable to give informed consent to sexual intercourse.

Relevance of offender's mental condition

Kearsley v R [2017] NSWCCA 28

4.3 The offender, a professor of radiation oncology pleaded guilty to charges of administering an intoxicating substance with intent and indecent assault against the victim, a medical practitioner. He was sentenced to an aggregate sentence of 4 years and 3 months imprisonment with a non-parole period of 2 years and 3 months.

4.4 The CCA allowed the offender's appeal against sentence on the ground that the sentencing judge did not properly assess the objective gravity of the intoxicating substance offence.

4.5 In resentencing the offender, the CCA considered how the offender's mental condition should be taken into account. There was evidence at the original sentencing that the offender had a major depressive disorder at the time of the offence. The sentencing judge found that the link with the offence was tenuous at best and general deterrence and denunciation "still had a part to play in the sentencing process".

4.6 The CCA noted authority that mental condition sometimes makes an offender an unsuitable subject for general deterrence, even when the mental condition had little relevance to the offence itself. Justice Macfarlan (with whom Justice Schmidt agreed) concluded that the offender's mental condition should be taken into account when considering the issue of general deterrence, but regarded it has having only limited significance:

> as ... ordinary members of the community would not in my view expect a person suffering from a depressive condition of the kind from which Mr Kearsley suffered (but which did not play any significant causative role in his or her offending) to receive a significantly lower sentence for offences of the type in question than would otherwise be the case. General deterrence therefore remains of significance.[2]

4.7 The CCA found that the offender's strong subjective case justified a reduced aggregate sentence of 18 months imprisonment with a non-parole period of 9 months.

Effect of sentence on offender's family – exceptional circumstances

Costello v R [2017] NSWCCA 32

4.8 The offender was sentenced to 3 years and 3 months imprisonment (with a non-parole period of 1 year and 10 months) for an offence of dangerous driving occasioning death.

2. *Kearsley v R* [2017] NSWCCA 28 [8]. See also [123] (Schmidt J).

4.9 The offender appealed the sentence on the grounds of fresh evidence which could not, with reasonable diligence, have been obtained at the time of the sentencing hearing. The evidence was an unexpected diagnosis of terminal cancer in the offender's partner and mother of their two young children. This raised considerations of exceptional hardship from incarceration for the offender's partner and children.

4.10 The CCA noted the offence was serious and that, normally, hardship on family members is often an inevitable consequence of a prison sentence. However, the CCA held that the sentence which the offender:

> would otherwise have to serve for his serious offending, if the community's proper expectations of punishment, retribution and deterrence were to be met, must be ameliorated by the need to extend mercy, in the truly exceptional circumstances which have only come to light and ... since [the offender] was sentenced. The result is that both a somewhat lesser sentence and a shorter non parole period must be imposed.[3]

4.11 The Court resentenced the offender to 3 years imprisonment, with a non-parole period of 1 year and 14 days.

Historic offences with a varying history of legislative penalties

Woodward v R [2017] NSWCCA 44

4.12 The offender (the victim's natural father) was sentenced to an aggregate term of imprisonment for a number of child sexual assault offences committed in the 1970s – 18 years, with a non-parole period of 9 years. Some of these offences (the common law offence of rape) attracted penal servitude for life. In the years between the abolition of rape in 1981 and 2017, the conduct constituting the offences was subject to maximum penalties ranging from 10 to 20 years imprisonment. The "modern analogue" for these offences was the offence of aggravated sexual intercourse without consent,[4] which has a prescribed penalty of 20 years imprisonment.

4.13 On appeal against sentence, the offender contended that he should have the advantage of the reduction to 10 years but that the court should have no regard to the increase to 20 years. He submitted that this was consistent with the policy of the criminal law (indicated by s 19 of the *Crimes (Sentencing Procedure) Act 1999* (NSW)) that offenders should receive the benefit of any reduction in penalties but not be subject to later increases.

4.14 The CCA observed that nothing in the general law or statute entitled the offender to such a result,[5] and held:

> The correct approach was to have regard to the maximum penalty at the time of the offence, any identifiable sentencing practices and patterns at that time, and the maximum penalty reflecting community attitudes prevalent at the time of sentencing. It would be entirely inappropriate to afford the applicant leniency by way of windfall by having regard to a lower maximum penalty that prevailed for a time before it was abandoned many years before he came to be sentenced.

3. *Costello v R* [2017] NSWCCA 32 [34].
4. *Crimes Act 1900* (NSW) s 61J.
5. *Woodward v R* [2017] NSWCCA 44 [74].

> The maximum penalty of 10 years' imprisonment that prevailed in the 1980's was never something the [offender] was potentially subject to. He is not disadvantaged by a sentencing court in the 21st century not having regard to it.[6]

4.15 The CCA dismissed the appeal.

Aggravation where offence takes place in home of the victim

Chung v R [2017] NSWCCA 48

4.16 The applicant was convicted by a jury of breaking and entering a dwelling house and committing a serious indictable offence (intimidation), in circumstances of aggravation, in that he knew a person was in the premises.[7] One ground of appeal on sentence was the sentencing judge erred in finding that the offending was aggravated by being committed in the home of the victim,[8] amounting to double counting.

4.17 The CCA found that there was no double counting, as there was no element to the offence that the premises on which the offence took place needed be those of the victim.[9]

Relevance of gambling addiction

Johnston v R [2017] NSWCCA 53

4.18 The offender was a senior accountant at a mining company. He pleaded guilty to obtaining financial advantage by deception. The amount systematically defrauded was $1.25m. The offender had a gambling addiction and, before sentencing, had begun therapy to address the problem. In this respect, the sentencing judge observed that a gambling addition generally does not warrant the extension of leniency. The offender was sentenced to 6 years and 6 months imprisonment with a non-parole period of 4 years.

4.19 The offender's grounds of appeal included that the sentencing judge erred in the weight he placed on the causative gambling addiction and its relevance to the objective seriousness of the offence.

4.20 The CCA noted that it has consistently held that the fact that offences were committed to feed a gambling addiction will not generally be a mitigating factor. After a discussion of authorities, Chief Justice Bathurst added that:

> in cases of this nature where general deterrence is an important factor, it would be inappropriate to treat an underlying explanation that the motive was gambling as a mitigating circumstance or reducing moral culpability particularly in cases such as the present, where the frauds were perpetrated and skilfully executed over an extended period.[10]

---

6. *Woodward v R* [2017] NSWCCA 44 [75]-[76].
7. *Crimes Act 1900* (NSW) s 112(2), s 105A(1) definition of "circumstances of aggravation".
8. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(eb).
9. *Chung v R* [2017] NSWCCA 48 [47]-[48].
10. *Johnston v R* [2017] NSWCCA 53 [38].

4.21 The CCA considered the principle (relied on by the offender) relating to drug addiction that allows a drug habit to be taken into account as a factor relevant to objective criminality of the offence in so far as it may throw light on such matters as "the state of mind or capacity of the offender to exercise judgment, for example, if he or she was in the grips of an extreme state of withdrawal of the kind that may have led to a frank disorder of thought processes or to the act being other than a willed act".[11] The CCA, however, concluded:

> there was nothing to suggest that over the period in which the frauds were committed the applicant lacked the capacity to exercise judgment, or that the crime was anything other than a willed act. The fact the addiction is included in DSM-V does not indicate to the contrary.[12]

Effect of compensation directions in mitigation of sentence

Upadhyaya v R [2017] NSWCCA 162

4.22 The offender was found guilty, after trial by jury, of 14 counts of defrauding a company and dishonestly obtaining a financial advantage of more than $10 million. The company applied for a compensation order under the *Victims Rights and Support Act 2013* (NSW) and the court made a compensation order of $750,000 after handing down the sentence.

4.23 One ground of appeal was that the sentencing judge failed to take into account the compensation order of $750,000 as a matter in mitigation of sentence. The CCA refused leave to appeal on this point. Justice Leeming (with whom Justice Latham agreed) observed that:

- The point of a compensation direction is to compensate a victim, reflecting a civil liability which is distinct from an offender's criminal liability.
- An offender's criminal conduct will very commonly also give rise to civil liability.
- The *Victims Rights and Support Act 2013* (NSW) prevents double compensation where amounts have been paid under a compensation direction and regulates enforcements where a compensation direction provides an additional basis for recovery of a judgment debt.[13]

4.24 It was common ground when the appeal was heard that the direction had not been enforced and that even if it were to be enforced, the bank had already sold the offender's assets. Justice Leeming observed that different considerations might arise where a compensation direction had been enforced and the enforcement had given rise to demonstrable hardship, but it was not necessary to express a view in the current appeal.[14]

11. *R v Henry* [1999] NSWCCA 111; 46 NSWLR 346 [273].
12. *Johnston v R* [2017] NSWCCA 53 [42].
13. *Upadhyaya v R* [2017] NSWCCA 162 [9]-[11].
14. *Upadhyaya v R* [2017] NSWCCA 162 [12]-[13].

Evidence of remorse

Imbornone v R [2017] NSWCCA 144

4.25 The offender pleaded guilty to five offences – aggravated break, enter and commit serious indictable offence, reckless wounding in company, assault occasioning actual bodily harm, steal from person and driving while disqualified. The sentencing judge imposed an aggregate sentence of 9 years with a non-parole period of 5 years and 6 months.

4.26 One ground of appeal was that the sentencing judge erred in not accepting remorse as a mitigating factor. The offender complained that the sentencing judge wrongly concluded that there was insufficient evidence to satisfy the requirements for remorse[15] because the offender himself did not give evidence at sentencing. The only evidence before the sentencing judge that could be relevant to a finding of remorse was what the offender said to a psychiatrist when being interviewed for a report.

4.27 The CCA found that the sentencing judge did not conclude that the offender needed to give evidence for there to be evidence of remorse. Rather, the offender's evidence on the question – that of the untested hearsay claim to the psychiatrist – was insufficient for him to find on the balance of probabilities that the applicant was in fact remorseful in the way required. The CCA observed that the conclusion was well supported by authority:

> This Court has frequently said that untested out of court statements made to third parties should be treated with caution. Although it should be a principle that is well known and understood it seems necessary to restate it. The following statements are derived from the authorities:
>
> (1) Although statements made to third parties are generally admissible in sentence proceedings ... courts should exercise very considerable caution in relying upon them where there is no evidence given by the offender. In many cases such statements can be given little or no weight.
>
> (2) Statements to doctors, psychologists, psychiatrists, the authors of pre-sentence reports and others, or assertions contained in letters written by an offender and tendered to the court, should all be treated with considerable circumspection. Such evidence is untested, and may be deserving of little or no weight.
>
> (3) It is open to a court in assessing the weight to be given to such statements to have regard to the fact that an offender did not give evidence and was not subject to cross-examination. It is one matter for an offender to express remorse to a psychologist or other third party and quite another to give sworn evidence and be cross-examined on the issue.
>
> (4) If an offender appearing for sentence wishes to place evidence before the court which is designed to minimise his or her criminality, or otherwise mitigate penalty, then it should be done directly and in a form which can be tested.
>
> (5) Whilst evidence in an affidavit from an offender which is admitted into evidence without objection may be accepted by a sentencing judge, generally the circumstances in which regard should be had to such

15. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(i).

> untested evidence is limited. Affidavits relied upon in the absence of oral evidence on oath frequently contain self-interested assertions of a character which makes them almost impossible to verify or test (particularly when served on the Crown in close proximity to, or on, the date of hearing). In the absence of any independent verification of the asserted behaviour, or state of mind, or of a tangible expression of contrition, "to treat this evidence with anything but scepticism represents a triumph of hope over experience".[16]

4.28 The CCA held that it was entirely open to the sentencing judge to conclude that the offender's statement to the psychiatrist could not be relied on as proof of remorse on the balance of probabilities, adding "indeed, it was the only sensible conclusion that could be reached".[17] Leave to appeal on this point was refused.

Good character in the context of domestic violence

R v Villaluna [2017] NSWSC 1390

4.29 The offender pleaded guilty to wounding with intent to cause grievous bodily harm to his ex-partner and to the murder of his ex-partner's dinner companion.

4.30 The offender did not have any convictions in NSW or elsewhere. He submitted, in relation to his character, that he had a good work record and had made a substantial contribution to the community. The agreed facts, however, stated that the offender engaged in acts of domestic violence and abuse towards the ex-partner over a sustained period before committing the offences. The Supreme Court held that the offender could not be sentenced on the basis that he was of prior good character.[18]

4.31 The Court concluded:

> [the victim] was brutally stabbed to death by the offender in a public place for no reason other than he attended a dinner date with the offender's ex-partner. [The ex-partner] was viciously wounded at the same time and for the same reason. These were cowardly and vicious attacks. They followed years of torment ... by the offender. As I have stated, the offender believed he owned [his ex-partner]. His actions were premeditated in that for some time he had determined that if he found [his ex-partner] with another man the offender would kill him and seriously harm her. In cases such as these general deterrence, retribution and denunciation are the dominant sentencing criteria. Perpetrators of extreme domestic violence can expect to spend most of the rest of their lives in prison. Leaving aside his plea of guilty, there is very little reason to afford this offender any leniency.[19]

4.32 The Court imposed an overall sentence of 40 years' imprisonment with a non-parole period of 30 years.

16. *Imbornone v R* [2017] NSWCCA 144 [57]. [References omitted.]
17. *Imbornone v R* [2017] NSWCCA 144 [59].
18. *R v Villaluna* [2017] NSWSC 1390 [67].
19. *R v Villaluna* [2017] NSWSC 1390 [85].

Use of evidence of good character in historic child sexual offences

Stanton v R [2017] NSWCCA 250

4.33 The offender pleaded guilty to a substantial number of historic sexual offences and offences of indecency against children while a professed member of a religious order and teacher in 1980 and 1981. He received an aggregate sentence of 23 years imprisonment, with a non-parole period of 13 years and 9 months.

4.34 One of the grounds in the appeal against the severity of the sentence was that the trial judge failed to give any mitigating effect to evidence of good character. The *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that in determining the appropriate sentence for a child sexual offence, a court cannot take into account an offender's good character or lack of previous convictions if the court is satisfied that it assisted the offender in the commission of the offence.[20]

4.35 The CCA observed that the provision, through the definition of child sexual offence,[21] appears to involve an exhaustive list of child sexual offences under particular provisions of the *Crimes Act 1900* (NSW). The offender's historic offences were not included on this list. There was, therefore, at least doubt whether the provision applied to the offender. It was accepted, however, that there was no real difference between the provision and otherwise applicable common law principles. The CCA rejected the ground of appeal, observing:

> The fact that good character was a condition precedent to him holding the position of a school teacher with access to young children makes it difficult for the Applicant to rely in any meaningful way upon evidence of what is said to be his otherwise good character.[22]

4.36 The offender was unsuccessful on all other grounds and the CCA dismissed the appeal.

Suspending aggregate sentences

DPP v Shillingsworth [2017] NSWCCA 224

4.37 The offender was convicted after a trial by jury of three counts of offences of violence. With respect to count 1, the offender was sentenced to 150 hours of community service. With respect to counts 3 and 4, the judge imposed an aggregate sentence of 21 months imprisonment, which he suspended.

4.38 The judge later amended the sentence because the offender applied under s 43(1) *Crimes (Sentencing Procedure) Act 1999* (NSW) on the basis that a suspended aggregate sentence was a penalty that is contrary to law. The judge imposed individual sentences for counts 3 and 4, largely in accordance with the indicative sentences noted in passing the aggregate sentence – 6 months imprisonment on count 3 and 18 months imprisonment on count 4. Both sentences were then suspended.

---

20. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5A).
21. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(6).
22. *Stanton v R* [2017] NSWCCA 250 [118].

4.39 In a prosecution appeal against inadequacy of sentence, the majority of the CCA considered it was not necessary to determine the question whether it was possible to suspend an aggregate sentence.[23]

4.40 Justice Basten, however, held that s 12(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should not be read as preventing a court from imposing a suspended sentence where the sentence is an aggregate sentence. He also left open the question of the effect of the amended orders in light of the fact that the original sentence was not contrary to law, noting that the "better view is that the first orders were valid, and have not been rescinded".[24]

Conspiracy to do acts in preparation for a terrorist act

R v Khalid [2017] NSWSC 1365

4.41 Five offenders pleaded guilty to the Commonwealth offence of conspiring to do acts in preparation for a terrorist act. One of the offenders was a juvenile.

4.42 In imposing the sentences, the Supreme Court observed:

> The religious and/or ideological motivation of an offender is relevant to the issue of community protection, as well as to the assessment of the objective seriousness of the offending. Consequently, where it is not established that an offender has resiled from previously held extremist views, the element of community protection will assume even greater importance. As previously noted, weight must be given to the need for general deterrence. This remains so, even if the force of ideological or religious motivations and considerations are such that deterrence may not be effective.[25]

4.43 The court noted that the offender bears the onus of establishing (on the balance of probabilities) that they have abandoned previously held extremist views and observed:

> Whilst an offender is under no obligation to give sworn evidence on sentence, it may be open to a court to conclude that the failure to do so means that the onus has not been discharged … In the absence of sworn evidence, the weight to be attached to statements made by [the offender to third parties] is necessarily limited.[26]

4.44 The court observed that such a position may be usefully contrasted with the offender in another case,[27] whose decision to give evidence, face cross-examination, and renounce and denounce his previously held beliefs, were found to be "significant mitigating circumstances".[28]

4.45 In sentencing the juvenile offender, the court observed that, viewed objectively, the juvenile offender engaged in "what is properly regarded as adult like behaviour". The court was satisfied on the evidence that the offender's immaturity contributed to his offending and, therefore, his youth was a mitigating factor. "However, in a case

23. *DPP Shillingsworth* [2017] NSWCCA 224 [42], [100].
24. *DPP Shillingsworth* [2017] NSWCCA 224 [47].
25. *R v Khalid* [2017] NSWSC 1365 [24].
26. *R v Khalid* [2017] NSWSC 1365 [121].
27. *DPP (Cth) v MHK* [2017] VSCA 157; 52 VR 272 [68].
28. *R v Khalid* [2017] NSWSC 1365 [227].

of offending as serious as this, youth does not mean that considerations of community protection, general deterrence and denunciation are rendered entirely irrelevant".[29]

Impact of sentence on offender's family and children

R v Martin [2017] NSWSC 1498

4.46 The offender pleaded guilty to attempted murder and to being an accessory after the fact to murder.

4.47 In sentencing the offender, the Supreme Court noted that the totality of the criminality called for a full-time custodial sentence of some length but that the individual circumstances of the offender and her children (amounting to extreme hardship) required a sentence tempered by a significant degree of compassion.

4.48 The offender had four children between 9 months and 7 years. One child (5 years) was significantly developmentally delayed (autism) and required assistance with everyday aspects of life. Another (9 months) had a variety of serious medical issues with high needs including NG tube, home oxygen and monitoring for seizures.

4.49 The court found special circumstances for setting the parole period for the attempted murder offence. These were the accumulation of the sentence on the sentence for the accessory offence and the exceptional factual circumstances concerning the special needs of the offender's children. The court aimed to achieve the lowest possible non-parole period in order to minimise:

- any period of separation between the offender and her children, or
- if she was accepted into the Mothers and Children Program, the period that the children would held in custody with their mother.

4.50 The court decided that total sentence should reflect the seriousness of the offence and serve the objectives of punishment that require the imposition of a significant term of imprisonment on somebody who has committed such objectively grave offences.[30]

4.51 The court partially accumulated the sentences for accessory (fixed term of 3 years and 3 months) and attempted murder (7.5 years with a non-parole period of 2.5 years) giving a total effective sentence of 9 years with a non-parole period of 4 years.

Sentencing for any substantial degree of drug trafficking

Parente v R [2017] NSWCCA 284

4.52 The offender pleaded guilty to two counts of supplying a prohibited drug and one count of supplying a commercial quantity of a prohibited drug. Three other offences were taken into account on a Form 1.

29. *R v Khalid* [2017] NSWSC 1365 [213].
30. *R v Martin* [2017] NSWSC 1498 [96].

4.53 The sentencing judge imposed an aggregate sentence of 4 years imprisonment with a non-parole period of 2 years. The Clark "principle"[31] that drug trafficking in any substantial degree should lead to a custodial sentence unless there are exceptional circumstances had been a significant feature of the sentencing submissions. In imposing the sentence, the judge found that the offender had not shown exceptional circumstances.

4.54 Some of the grounds of appeal raised the question of whether the Clark "principle" had any continuing application.

4.55 The CCA held that courts should approach sentencing in drug supply cases consistently with the general principles of sentencing, including the requirement that a court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate. The sentencing judge had accordingly erred by applying the Clark "principle".

4.56 It was, therefore, necessary for the CCA to re-exercise the sentencing discretion. However, the CCA concluded that a lesser sentence was not warranted in law, emphasising the importance of general deterrence and community protection.

Circumstances of sexual assault and objective seriousness

Armstrong v R [2017] NSWCCA 323

4.57 The offender was found guilty after jury trial of assault and two counts of aggravated sexual assault (involving digital penetration) against his domestic partner (the circumstances of aggravation were inflicting actual bodily harm immediately before the offence). The judge imposed concurrent sentences for the sexual assault offences, the longest sentence being 8 years and 9 months imprisonment with a non-parole period of 5 years and 9 months.

4.58 On appeal the offender submitted that the judge erred in determining the objective seriousness of the sexual assaults by failing to take into account the duration of each offence and that the offender did not undertake them to derive sexual gratification.

4.59 In refusing leave to appeal against sentence, the CCA concluded that the judge was entitled to regard the duration of the digital penetration as "largely irrelevant" in its context and observed "there is nothing to commend the proposition that engaging in sexual intercourse without consent to gratify oneself is in any sense more objectionable than doing so to humiliate and physically dominate another".[32]

Objective seriousness for SNPP offences

Yun v R [2017] NSWCCA 317

4.60 In 2005, the offender was found guilty of murder after a jury trial. The Court sentenced him to imprisonment for 26 years and 8 months, with a non-parole period of 20 years.

---

31. *R v Clark* (unreported, NSWCCA, 15 March 1990).
32. *Armstrong v R* [2017] NSWCCA 323 [35].

4.61 In 2008, the CCA found error in a severity appeal and resentenced the offender to 24 years imprisonment with a non-parole period of 18 years. In doing so, the CCA accepted that there was force in the Crown submission that the objective seriousness of this offence, given the applicant's intent, the use of a weapon and some level of premeditation, was at the middle of the range for such offences.

4.62 After the High Court's decision in *Muldrock v R* [2011] HCA 39, which applies to the sentencing of standard non-parole period (SNPP) offences, the offender was successful in a second application for an inquiry into his sentence. The offender submitted that *Muldrock* error was apparent in the CCA's resentencing in that the CCA had, amongst other things, taken into account matters which were personal to the appellant when assessing the objective seriousness of his offending for an SNPP offence.

4.63 The CCA rejected the contention that, when assessing the objective seriousness of an SNPP offence, a court cannot consider the offender's mental state, duress, provocation, and mental illness (where causally related to the commission of the offence). The CCA observed that, subject to one or two possible exceptions, the CCA had:

> invariably determined since Muldrock ... that an offender's mental condition at the time of the commission of the offence is a critical component of "moral culpability" which in turn affects the assessment of "objective seriousness".[33]

Taking current sentencing practice into consideration

DPP (Vic) v Dalgliesh [2017] HCA 41

4.64 The offender pleaded guilty to a number of child sex offences against the daughters of his de facto spouse. One of the victims became pregnant as a result and the pregnancy was terminated.

4.65 The offender was sentenced in the Victorian County Court to a total term of imprisonment of 5 years and 6 months with a non-parole period of 3 years.

4.66 The Victorian Director of Public Prosecutions appealed the sentence in relation to one of the offences, alleging that the sentence of 3 years and 6 months was manifestly inadequate, and that the accumulation of this sentence resulted in a total effective sentence which was manifestly inadequate.

4.67 The Victorian Court of Appeal concluded that a longer sentence was warranted but dismissed the appeal on the ground that the DPP was "unable to establish that the sentences imposed were outside the range of sentences reasonably open to the sentencing judge based upon existing sentencing standards".[34] The Court of Appeal noted that under the *Sentencing Act 1991* (Vic),[35] courts are required to have regard to "current sentencing practices".

4.68 On appeal to the High Court the DPP argued that the Court of Appeal had erred by failing to conclude that the sentencing judge erred by imposing a sentence that was manifestly inadequate. In particular, the DPP said that the Court of Appeal erred in

33. *Yun v R* [2017] NSWCCA 317 [47].
34. *DPP (Vic) v Dalgliesh* [2016] VSCA 148 [4].
35. *Sentencing Act 1991* (Vic) s 5(2)(b).

elevating the significance of current sentencing practices so that they were determinative of the issue.

4.69 The majority of the High Court observed that the reasonable consistency expected of the justice system in the application of the relevant legal principles does not, however, "require adherence to a range of sentences that is demonstrably contrary to principle".[36]

4.70 The High Court, allowing the appeal, concluded that:

> Given the Court of Appeal's conclusion that a sentence significantly higher than seven years' imprisonment for [the offence] was plainly warranted having regard to the maximum penalty prescribed for the offence, the gravity of the offence, the respondent's culpability, and the impact of the offence on the complainant, the Court should have allowed the Director's appeal. Section 5(2)(b) of the Sentencing Act did not require the Court to refrain from acting to remedy what it recognised to be a manifest injustice resulting from the perpetuation of an error of principle.[37]

4.71 The matter was remitted to the Victorian Court of Appeal to deal with the appeal against sentence. The Court increased the sentence for the offence that was appealed to the High Court, resulting in a total effective sentence of 9 years and 6 months imprisonment with a non-parole period of 6 years.[38]

36. *DPP (Vic) v Dalgliesh* [2017] HCA 41 [50].
37. *DPP (Vic) v Dalgliesh* [2017] HCA 41 [76].
38. *DPP (Vic) v Dalgliesh* [2017] VSCA 360.

5. Review of intensive correction orders

In brief

Since 2011 the number of offenders sentenced to an intensive correction order ("ICO") has increased. In 2017, 2166 offenders were sentenced to ICOs. In 2017, 1.4% 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.

Background 35
Overview of ICOs 36
Use of ICOs 37
Regional use of ICOs 40
Indigenous status 42
ICO sentence lengths 43
ICO suitability assessments 44
Offence characteristics 45
Discharges 46
Breach information 47
Breach process 47
Breach rates 48
Conclusion 49

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 Bill for the *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010* (NSW).[1] This is the eighth such annual report. It is in addition to the statutory review of the ICO provisions of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("CSPA") that we completed in 2016.[2]

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 2017. We have obtained statistical information on the use of ICOs from Corrective Services NSW ("CSNSW"), and the NSW Bureau of Crime Statistics and Research ("BOCSAR").

5.3 It is expected that the existing provision for intensive correction orders will be replaced in October 2018 when the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) is proclaimed. These changes followed recommendations in the NSW Law Reform Commission Report, *Sentencing,* which analysed the strengths and weaknesses of ICOs, and recommended a more flexible order to replace the existing intensive correction orders, suspended sentences, and

1. NSW, *Parliamentary Debates*, Legislative Council, 22 June 2010, 24426.
2. NSW Sentencing Council, *Intensive Correction Orders: Statutory Review,* Report (2016).

home detention orders.[3] We endorsed these recommendations in our statutory review of intensive correction orders.[4]

Background

5.4 In our 2007 *Review of Periodic Detention*,[5] we recommended that the sentence of periodic detention should be replaced by a new sentencing option: a community 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.

5.5 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.[6]

Overview of ICOs

5.6 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.[7]
- 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,[8] or who have committed a prescribed sexual offence.[9]
- A court cannot set a parole period for an ICO;[10] 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.

3. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) Recommendations 11.1-11.6.
4. NSW Sentencing Council, *Intensive Correction Orders: Statutory Review*, Report (2016) [3.45]-[3.46].
5. NSW Sentencing Council, *Review of Periodic Detention* (2007).
6. NSW Sentencing Council, *Review of Periodic Detention* (2007) [9.3].
7. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7.
8. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67(1)(a).
9. *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.
10. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7(2).

- 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.[11]

- 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.[12]

5.7 In Chapter 2 we summarise a recent Bureau of Crime Statistics and Research study that found there was an 11-31% reduction in the probability of re-offending for an offender who received an ICO compared with an offender who received a prison sentence of up to 2 years.[13]

Use of ICOs

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

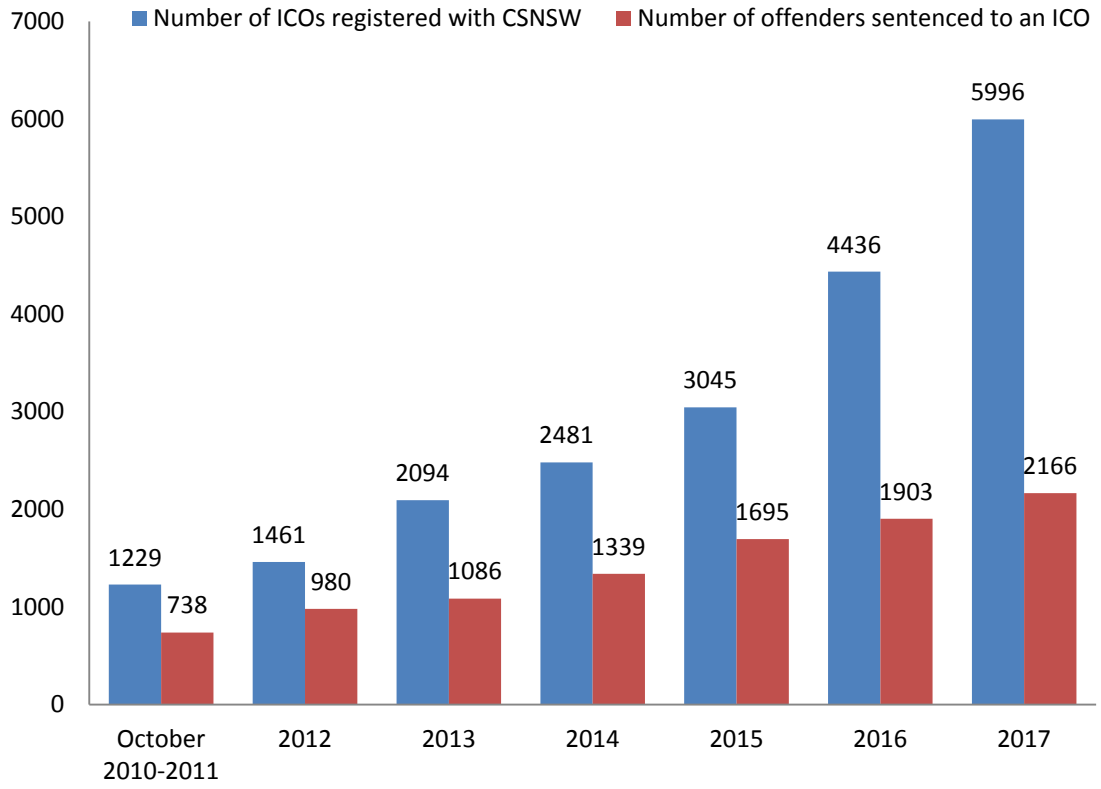
- In 2017, 2166 offenders were sentenced to 5996 ICOs. This indicates that some offenders are sentenced for more than one offence, when the court decides that they should serve their sentence by way of an ICO. CSNSW registers an ICO for each offence.

- Since 2011 there has been moderate growth each year in the number of offenders sentenced to an ICO.

- There has been a substantial growth in the number of ICOs registered with CSNSW each year (a 97% increase since 2015).

11. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 70.
12. *Crimes (Sentencing Procedure) Regulation 2017* (NSW) cl 15.
13. See [2.5]-[2.8].

Figure 5.1: The number of offenders sentenced to ICOs and the number of ICOs registered with CSNSW, 2010 – 2017



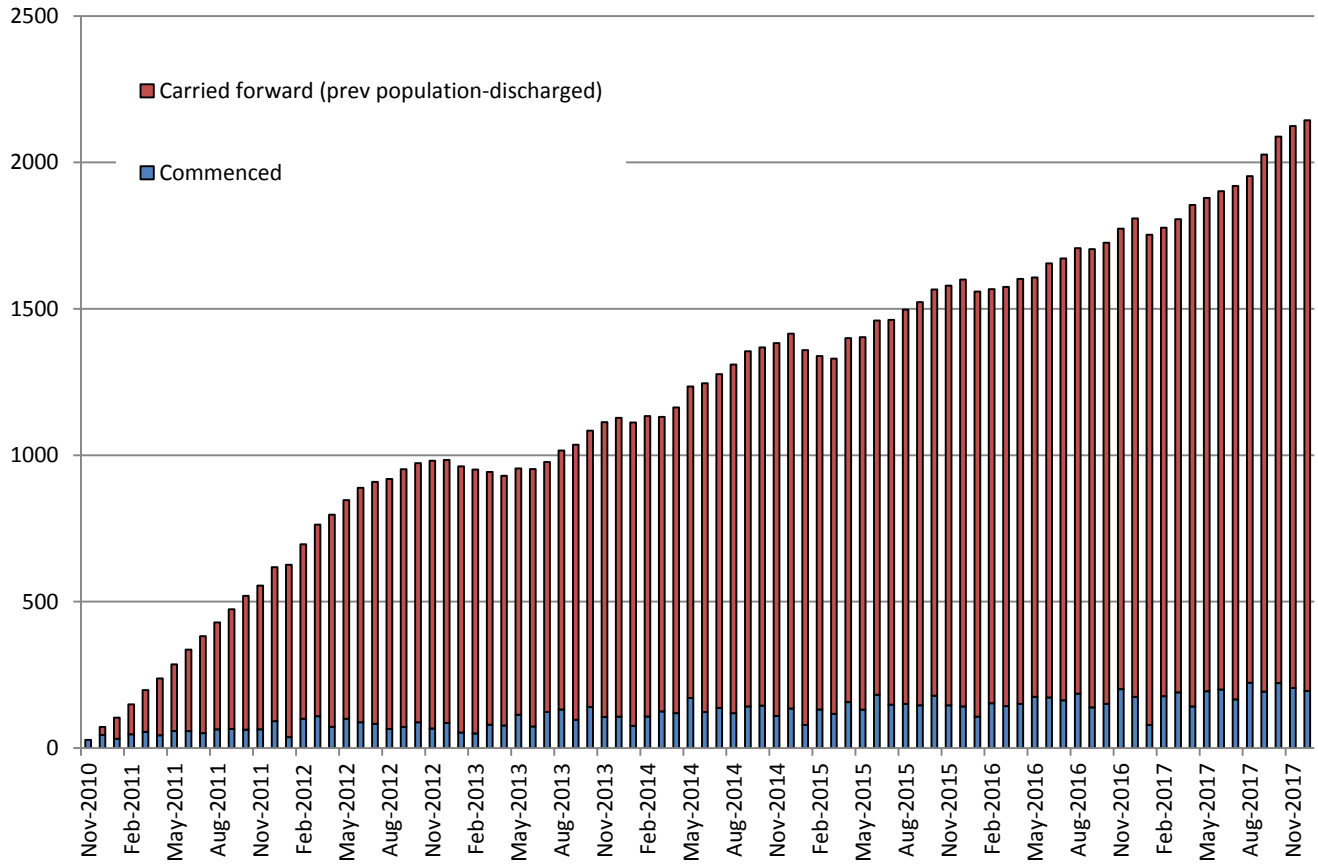
Source: Corrective Services NSW, 2018.

5.9 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 2017. 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, with seasonal declines in December and January each year
- the month which saw the highest number of offenders serving an ICO (2144) was December 2017, and
- August 2017 saw the greatest number of new offenders (223) register for the commencement of an ICO.[14]

14. Information provided by Corrective Services NSW, 2017.

Figure 5.2: The number of offenders supervised on an ICO per month between November 2010 and December 2017



Source: Corrective Services NSW, 2018.

5.10 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 2011-2017. The data in Table 5.1 shows the following:

- In 2017, 1.4% (1805) 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 increased.

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

Table 5.1: The number and percentages of people receiving an ICO, as the principal penalty, in the NSW Higher and Local Courts, 2011-2017

Year	Number of penalties issued	Number of persons receiving an ICO	ICOs as a percentage of total penalties
2011	112,481	620	0.6
2012	105,837	898	0.8
2013	107,013	1032	1.0
2014	110,702	1285	1.2
2015	118,121	1337	1.1
2016	124,623	1528	1.2
2017	127,696	1805	1.4

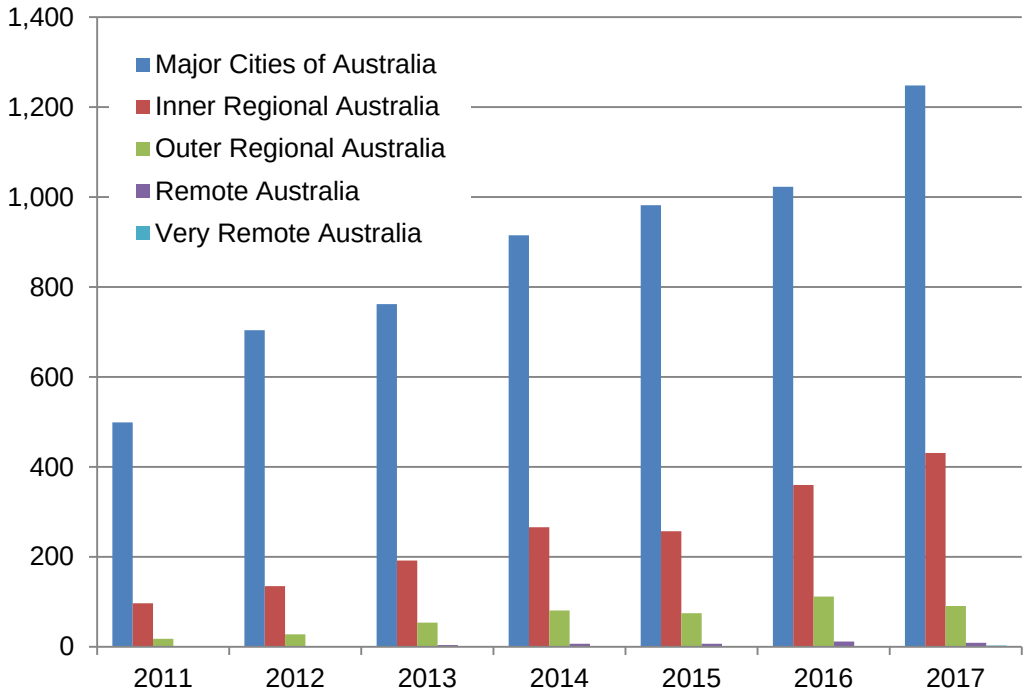
Source: NSW Bureau of Crime Statistics and Research, 2018 (unpublished data, ref: Dg1816384).

Regional use of ICOs

5.12 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 2011–2017. ARIA is a nationally recognised measure of geographic remoteness in Australia. The data from Figure 5.3 shows that in 2017:

- 1248 ICOs were issued in the Australian major cities
- 431 ICOs were issued in Inner Regional Australia
- 91 ICOs were issued in Outer Regional Australia, and
- 12 ICOs were issued in Remote and Very Remote Australia.

Figure 5.3: The number of people, by ARIA, receiving an ICO as the principal penalty in the NSW Higher and Local courts, 2011-2017

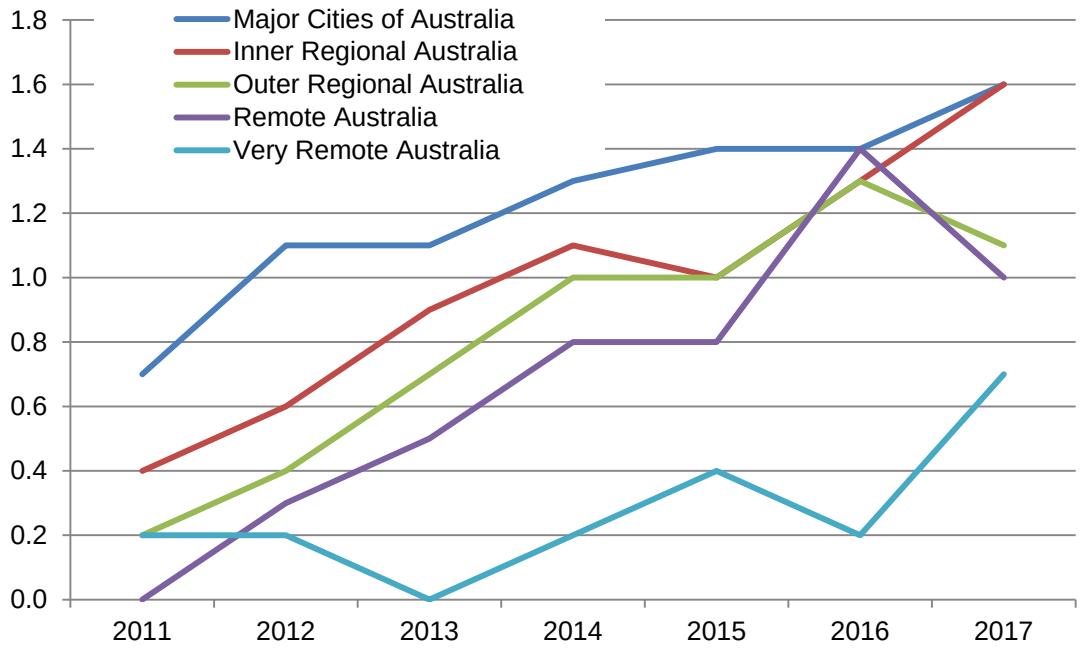


Source: NSW Bureau of Crime Statistics and Research, 2018 (unpublished data, ref: Dg1816384).

5.13 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 2011–2017. The data from Figure 5.4 shows that:

- since 2011, there has been growth in the percentage of ICOs issued as a proportion of all principal penalties handed down from the NSW Higher and Local Courts
- despite decreases in Outer Regional Australia and Remote Australia compared with 2016, the proportion of ICOs of all penalties issued has increased across all regions since 2015, and
- overall, the proportion of ICOs of all penalties issued is merging across most regions.

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, 2011-2017



Source: NSW Bureau of Crime Statistics and Research, 2018 (unpublished data, ref: Dg1816384).

Indigenous status

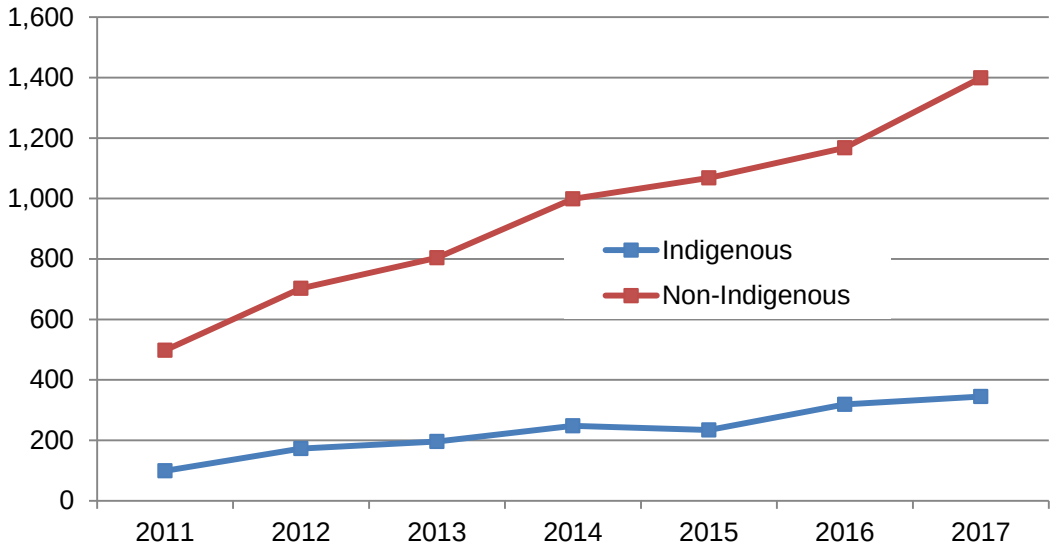
5.14 Figure 5.5 shows the number of people, by Indigenous status, who received an ICO as the principal penalty in the NSW Higher and Local Courts from 2011–2017. In 2017, 1805 offenders were issued an ICO as the principal penalty, of which:

- 345 (19%) were Indigenous offenders
- 1399 (78%) were non-Indigenous offenders, and
- 69 (4%) were unknown.[15]

5.15 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 and carried on in 2017 with a 47% increase from 2015 and a 39% 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, 2011-2017



Source: NSW Bureau of Crime Statistics and Research, 2018 (unpublished data, ref: Dg1816384).

ICO sentence lengths

5.16 Table 5.2 compares the average sentence length for people found guilty in finalised trial and sentence appearances in Local and Higher Courts for 2011–2017. 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, 2011-2017

Year	Average sentence length in months			
	Local Court	District Court	Supreme Court	Average length across all courts
2011	9.8	20.4	24.0	11.4
2012	10.0	19.9	24.0	11.2
2013	10.2	20.1	-	11.7
2014	10.7	20.2	-	12.0
2015	10.5	20.3	-	11.9
2016	10.8	19.9	-	12.5
2017	10.6	19.2		12.5

Source: NSW Bureau of Crime Statistics and Research, 2018 (unpublished data, ref: sr18-16383).

ICO suitability assessments

5.17 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.

5.18 Table 5.3 shows the outcomes of assessments for ICO suitability. In 2017, 3163 offenders were assessed. Of the offenders who were assessed:

- 2119 (67%) were assessed as "suitable"
- 1015 (32%) were assessed as "unsuitable", and
- 29 (1%) were included in the "other" or "unknown" category.[16]

5.19 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 percentage of offenders assessed as "suitable" has increased almost every year since 2010.

Table 5.3: Sentencing outcomes for offenders assessed for ICO suitability

Assessment Outcome	2010 - 2012		2013		2014		2015		2016		2017	
	No	%	No	%	No	%	No	%	No	%	No	%
Suitable	1725	57%	1190	58%	1507	61%	1672	66%	1907	65%	2119	67%
Unsuitable	1284	42%	799	39%	942	38%	831	33%	962	33%	1015	32%
Other/ Unknown	34	1%	50	3%	28	1%	38	1%	50	2%	29	1%
Total	3043	100%	2039	100%	2477	100%	2541	100%	2921	100%	3163	100%

Source: Corrective Services NSW, 2018.

5.20 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 2017.

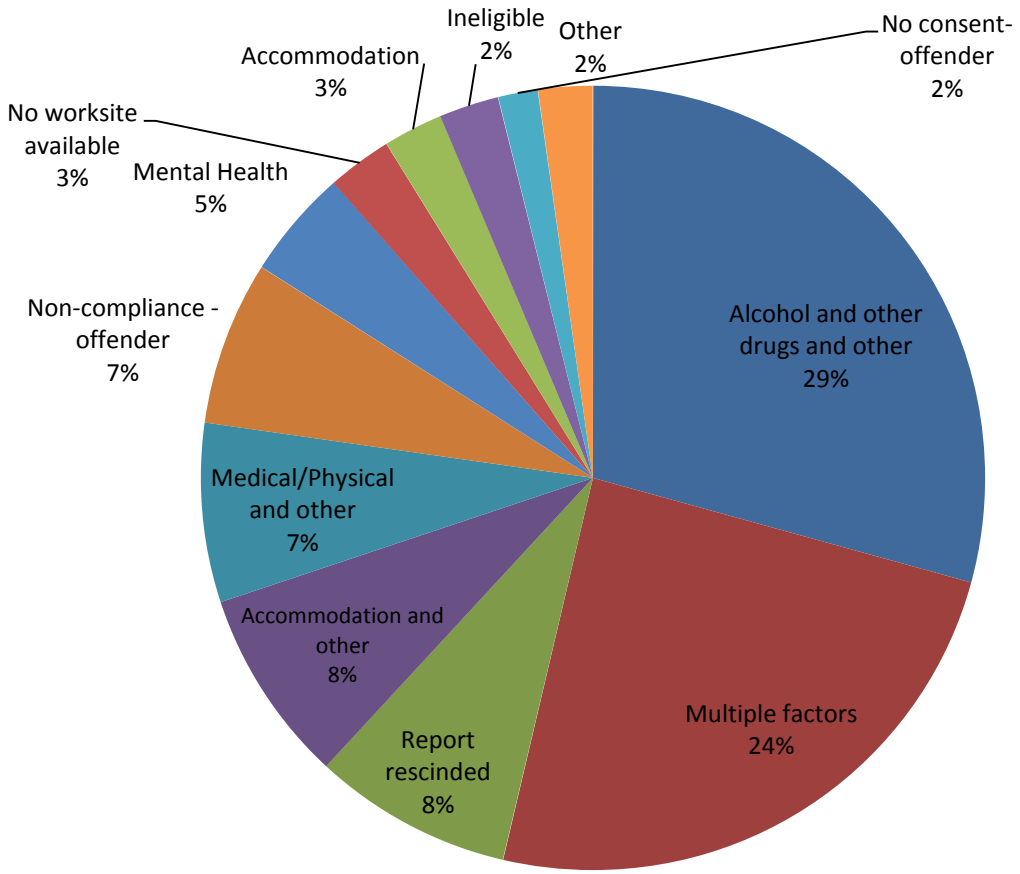
5.21 Of the 1993 offenders assessed as unsuitable in 2017, reasons were not recorded for 1505 offenders (73%). This is represents a substantial increase when compared with the 645 offenders who were assessed in 2016 as unsuitable due to unknown or unspecified factors. This lack of information makes annual comparisons unfeasible.

5.22 Figure 5.6 shows that of the 488 offenders assessed as unsuitable in 2017 whose reasons for unsuitability were recorded:

- 143 offenders (29.3%) were assessed as unsuitable due to alcohol, drugs, and other factors, and
- 119 offenders (24.4%) were assessed as unsuitable due to multiple factors.

16 The category "Other" includes: resources not available, report rescinded, offender deceased and offender ineligible for ICO.

Figure 5.6: Factors contributing to an offender being assessed as unsuitable, 2017



Source: Corrective Services NSW, 2018.
"Other" includes: Resources not available; Non-compliance - co-resident; Ineligible - sex offender; Ineligible – age.

Offence characteristics

5.23 Table 5.4 shows the most common offences for which ICOs were imposed in 2017.[17] The three most common offences were:

- acts intended to cause injury, 681 (31.2%)
- traffic and vehicle regulatory offences, 413 (18.9%), and
- illicit drug offences, 321 (14.7%).[18]

17. 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.
18. Data provided by Corrective Services NSW, 2017.

Table 5.4: Profile of the most common offences for which ICOs were imposed, 2010-2017

Offence classification	2010 - 2012		2013		2014		2015		2016		2017	
	Offend-ers	%	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	4	0.2
Acts intended to cause injury	458	27	340	28.5	456	30.2	545	31.8	638	33.3	681	31.2
Sexual assault and related offences	23	1.4	16	1.3	22	1.5	28	1.6	44	2.3	53	2.4
Dangerous or negligent acts endangering persons	110	6.5	76	6.4	77	5.1	76	4.4	83	4.3	138	6.3
Abduction, harassment and other offences against the person	6	0.4	9	0.8	8	0.5	17	1.0	16	0.8	15	0.7
Robbery, extortion and related offences	39	2.3	38	3.2	40	2.7	33	1.9	31	1.6	35	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	108	4.9
Theft and related offences	65	3.8	67	6.5	65	4.3	81	4.7	77	4.0	89	4.1
Fraud, deception and related offences	117	6.9	66	5.5	98	6.5	97	5.7	127	6.6	149	6.8
Illicit drug offences	152	9.0	92	7.7	157	10.4	193	11.3	245	12.8	321	14.7
Prohibited and regulated weapons and explosives offences	30	1.8	13	1.1	23	1.5	25	1.5	31	1.6	32	1.5
Property damage and environmental pollution	25	1.5	16	1.3	16	1.1	13	0.8	21	1.1	26	1.2
Public order offences	24	1.4	12	1.0	27	1.8	32	1.9	39	2.0	37	1.7
Traffic and vehicle regulatory offences	518	30.6	349	29.3	396	26.2	433	25.3	388	20.2	413	18.9
Offences against justice procedures, govt security and govt operations	44	2.6	28	2.3	34	2.3	46	2.7	50	2.6	70	3.2
Miscellaneous offences	2	0.1	3	0.3	6	0.4	8	0.5	5	0.3	15	0.7
Total	1695	100	1193	100	1509	100	1713	100	1917	100	2186	100

Source: Corrective Services NSW, 2018.
Offence classification in accordance with the Australian Standard Offence Classification 2008 Division.

Discharges

5.24 In 2017, 4559 ICOs were discharged; of this number:

- 3039 (66.7%) were discharged as the result of successfully completing the ICO
- 1381 (30.3%) were revoked, and
- 139 (3.0%) were discharged for other reasons.

5.25 Table 5.5 below shows the numbers of ICOs that were discharged due to successful completion or to revocation from October 2010 – December 2017.

5.26 There has been a gradual increase each year in the number of discharges due to the successful completion of the order. However, the percentage of orders successfully completed has declined over the same period. It is not clear from the data available whether this trend applies to individuals regardless of the number of ICOs they are subject to.

Table 5.5: Discharge of ICOs, 2010-2017

Reason for discharge	2010 - 2012		2013		2014		2015		2016		2017	
	No	%	No	%	No	%	No	%	No	%	No	%
ICOs successfully completed	1032	78.5%	1262	72.8%	1570	70.9%	1917	71.3%	2233	70.2%	3039	66.7%
ICOs Revoked	261	19.8%	436	25.2%	589	26.6%	717	26.7%	896	28.1%	1381	30.3%
ICO discharged for other reasons	22	1.7%	35	2.0%	54	2.4%	54	2.0%	54	1.7%	139	3.0%
TOTAL	1315	100%	1733	100%	2213	100%	2688	100%	3183	100%	4559	100%

Source: Corrective Services NSW, 2018.

Breach information

Breach process

5.27 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).

5.28 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.

5.29 SPA can take a number of courses of action in response to a serious breach. For example, SPA can issue a warning, impose a period of home detention for up to 7 days, or revoke the ICO.[19]

5.30 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.

5.31 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

5.32 In relation to the ICOs revoked by SPA, the majority of revocations were for breaches of two or more conditions. Table 5.6 shows the number of breaches of key mandatory conditions that led to the revocation of an ICO for 2014-2017.

Table 5.6: Mandatory conditions breached resulting in revocation of an ICO, 2014-2017

The breach of conditions which lead to revocation	Number of breaches of mandatory conditions resulting in revocation			
	2014	2015	2016	2017
Undertake 32 hours of community service work per month	152	240	253	245
Be of good behaviour and not commit any offence	181	227	239	274
Comply with all reasonable directions of a supervisor	169	219	227	187
Engage in activities to address the factors associated with his or her offending	95	124	130	87
Reside only at premises approved by a supervisor	73	77	91	62

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

The breach of conditions which lead to revocation	Number of breaches of mandatory conditions resulting in revocation			
	2014	2015	2016	2017
Refrain from using prohibited drugs, obtaining drugs unlawfully or abusing drugs lawfully obtained	48	64	62	48
Submit to breath testing, drug testing or other medically approved test procedures	15	12	19	1
Authorise medical practitioner, therapist or counsellor to provide information for admin of order	-	-	-	1
Other	23	16	14	32
Total	756	979	1035	937

Source: Corrective Services NSW, 2018.

Conclusion

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

5.34 Minor trends observed in 2017 include:

- decreases in the percentages of ICOs imposed as a proportion of all penalties in Outer Regional Australia and Remote Australia
- a continuing decrease in the proportion of ICOs imposed for Traffic and vehicle regulatory offences and a continuing increase in the proportion of ICOs imposed for illicit drug offences, and
- a continuing decrease in the proportion of ICOs successfully completed and a continuing increase in the proportion of ICOs revoked.

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 51
Council members 52
Council business 53
Communications 53
Staffing 53

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 2017, three appointments to the Council expired. All three members were reappointed: Tracey Booth, Wayne Gleeson and Moira Magrath.

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

Council business

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

6.7 During 2017: we received a presentation from

- Jia Jia Wang presented the findings of the BOCSAR study - Intensive correction orders versus short prison sentence: A comparison of re-offending.
- His Honour Judge Matthew Myers AM, a Commissioner with the Australian Law Reform Commission, sought members' views on the ALRC's review of incarceration rates of Aboriginal and Torres Strait Islander people.

6.8 We have maintained close working relationships with the Bureau of Crime Statistics and Research, and other parts of the Department of Justice, including Corrective Services NSW – Sentence Administration.

Communications

6.9 During 2017, we developed a communications strategy to engage better with people with a particular interest in sentencing, including journalists and legal studies students.

6.10 As part of this strategy, we introduced new pages on our website targeted to HSC students and news and media.

Staffing

6.11 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.