Annual Report 2023

Sentencing Trends and Practices

NSW Sentencing Council

NSW Sentencing Council

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www.sentencingcouncil.nsw.gov.au
Email: sentencingcouncil@justice.nsw.gov.au

Locked Bag 5000
Parramatta NSW 2124 Australia

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1. Sentencing trends

1.1 This chapter sets out general data about the Local Court and higher courts' use of penalties in NSW in 2023, with a particular focus on gender and Aboriginal status as well as the regional location of offenders.

1.2 It also sets out data on:

- the discharge of intensive correction orders (ICOs), community correction orders (CCOs) and conditional release orders (CROs), and
- the breach, revocation and amendment of ICOs, CCOs and CROs.

Use of penalties

1.3 2023 was the fifth full year of operation of the current sentencing regime, which commenced in September 2018,[1] following recommendations from the NSW Law Reform Commission.[2] The following penalties ("relevant penalties") are available under this regime:

- imprisonment[3]
- ICO[4]
- fine[5]
- CCO[6]
- CRO with a conviction recorded[7]
- conviction only (with no other penalty)[8]
- CRO without a conviction recorded,[9] and
- no conviction (dismissal).[10]

1.4 This part of the chapter sets out data for 2023 relating to each sentencing option both generally and in relation to offenders' gender, Aboriginal status and region.

General sentencing outcomes

1.5 There were 116,621 occasions where offenders received one of the relevant penalties as a principal penalty in the Local Court and higher courts in 2023. Most cases (approximately 98%) were finalised in the Local Court.[11] Some of these were for fine-only offences, such as some traffic and regulatory offences; for those

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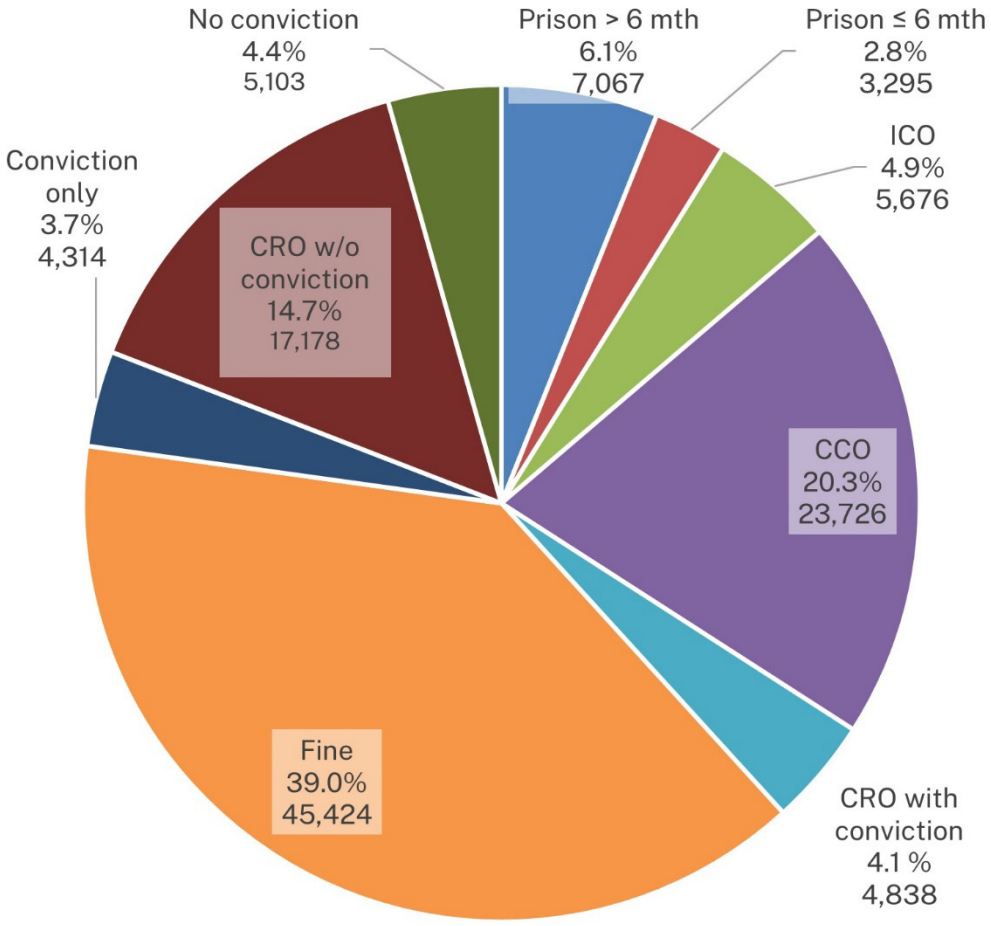
1. *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW).
2. NSW Law Reform Commission, *Sentencing*, Report 139 (2013).
3. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5, pt 4.
4. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7, pt 5; *Crimes (Administration of Sentences) Act 1999* (NSW) pt 3, pt 7 div 1.
5. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 2 div 4.
6. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 8, pt 7; *Crimes (Administration of Sentences) Act 1999* (NSW) pt 4B.
7. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 9, pt 8; *Crimes (Administration of Sentences) Act 1999* (NSW) pt 4C.
8. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10A.
9. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 9, s 10(1)(b), pt 8; *Crimes (Administration of Sentences) Act 1999* (NSW) pt 4C.
10. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(1)(a).
11. NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Court Statistics Jan 2019–Dec 2023* (2024) table 1.

offences, imprisonment, ICOs and CCOs were not available. Figure 1.1 sets out the percentage of offenders who received each penalty.

1.6 As has been the case in the last four years, the most common penalty in 2023 was a fine (39.0%), followed by a CCO (20.3%), and a CRO without a conviction (14.7%). Imprisonment accounted for 8.9% of penalties imposed (2.8% for sentences of 6 months or less and 6.1% for sentences of more than 6 months).

1.7 We have excluded outcomes where the breach of a non-custodial sentencing order was treated as the principal offence. We deal with these breaches separately at the end of this chapter.

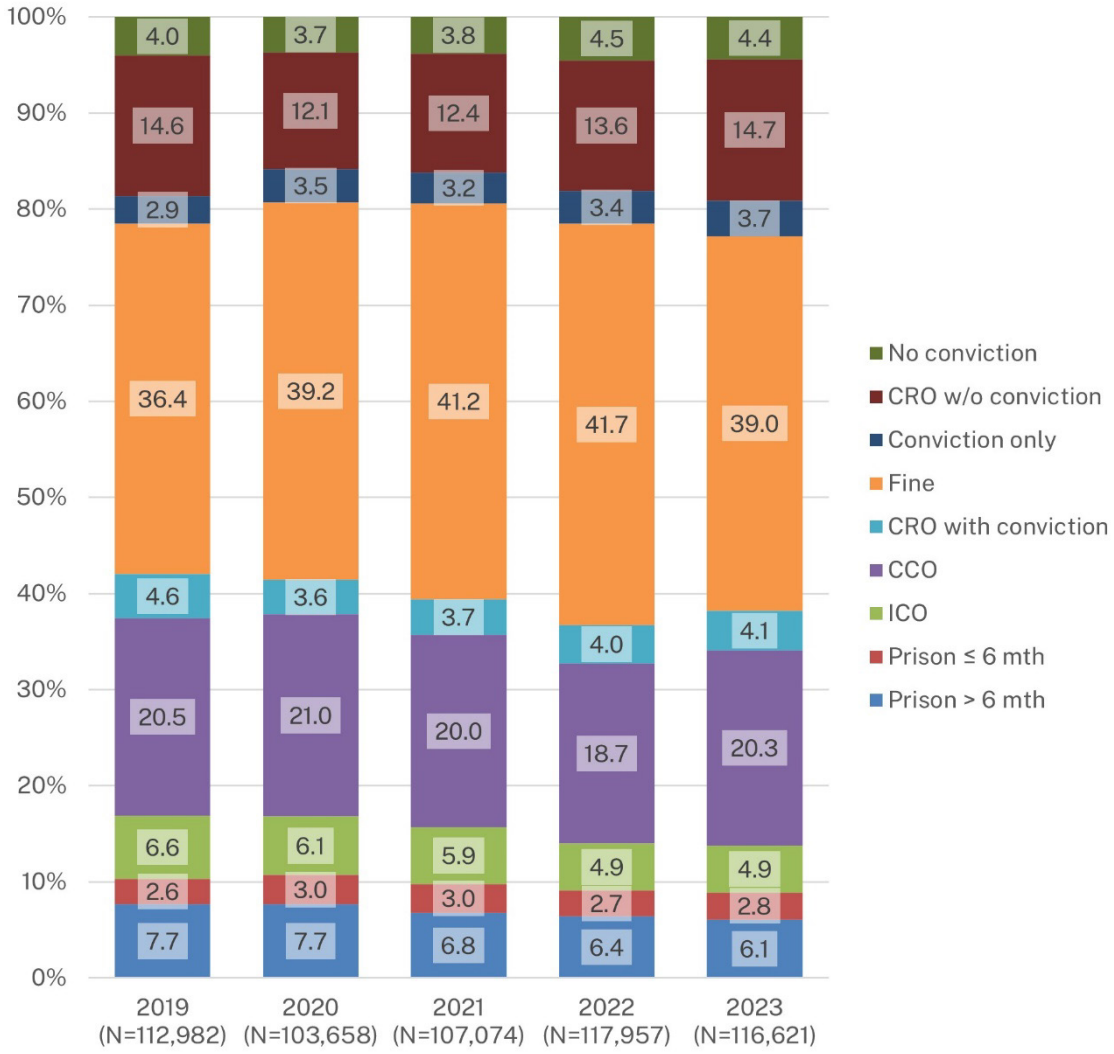
Figure 1.1: NSW higher and local criminal courts, principal penalties imposed, 2023



Source: NSW Bureau of Crime Statistics and Research, reference 24-23463.
The data tables for this figure are in Appendix A.

1.8 Figure 1.2 shows the proportion of penalties imposed in each calendar year since the introduction of the new sentencing regime.

Figure 1.2: NSW higher and local criminal courts, principal penalties imposed for each year, 2019 – 2023



Source: NSW Bureau of Crime Statistics and Research, reference 24-23463.
The data tables for this figure are in Appendix A.

1.9 The following trends can be observed for 2019 – 2023:

- a decline in the use of imprisonment of more than 6 months (from 7.7% to 6.1%)
- a decline in the use of ICOs (from 6.6% to 4.9%), and
- an increase in the use of conviction only (from 2.9% to 3.7%).

1.10 The increase observed for 2019 – 2022 in the use of fines (36.4% to 41.7%) did not continue in 2023 where the proportion was 39.0%.

Gender and Aboriginal status

1.11 The data below shows a continuing over-representation of Aboriginal offenders in NSW when compared with non-Aboriginal offenders (that is, offenders who were not Aboriginal or whose Aboriginal status was unknown).

1.12 In last year's report we examined trends in sentencing Aboriginal offenders in 2019 – 2022. No notable changes in trends were exhibited in the recent data.

1.13 Some of the studies summarised in chapter 2 specifically considered Aboriginal people, in particular one which identified the need for supports for Aboriginal young people with a family history of incarceration[12] and another that looked at the causes for proportionately lower use of cannabis cautioning for Aboriginal people.[13]

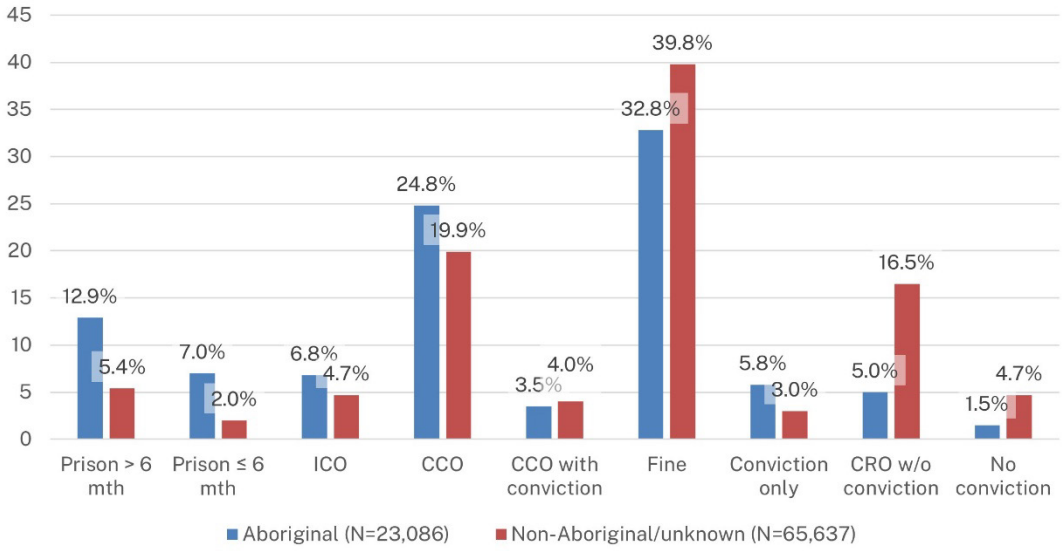
Aboriginal male offenders

1.14 There were 23,086 occasions where Aboriginal men received a relevant penalty as a principal penalty in 2023, compared with 65,637 occasions where non-Aboriginal men received a relevant sentence. According to these numbers, 26.0% of male offenders were recorded as Aboriginal. Aboriginal men represent 4.2% of the male resident population in NSW.[14]

1.15 Figure 1.3 shows the proportion of penalties imposed on male offenders by Aboriginal status. Compared with other male offenders, a much greater proportion of Aboriginal men received sentences of imprisonment (19.9% compared with 7.4%) and a much smaller proportion of Aboriginal men received a sentence that did not involve a conviction (6.4% compared with 21.2%).

12. [2.70], [2.72].
13. [2.13]–[2.21].
14. Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians*, 30 June 2021 (retrieved 20 June 2024).

Figure 1.3: Distribution of penalties among Aboriginal men and non-Aboriginal men in NSW higher and local criminal courts, 2023



Source: NSW Bureau of Crime Statistics and Research, reference 24-23463.
The data tables for this figure are in Appendix A.

1.16 Figure 1.4 shows the percentage of Aboriginal men who received each penalty, compared with non-Aboriginal men.

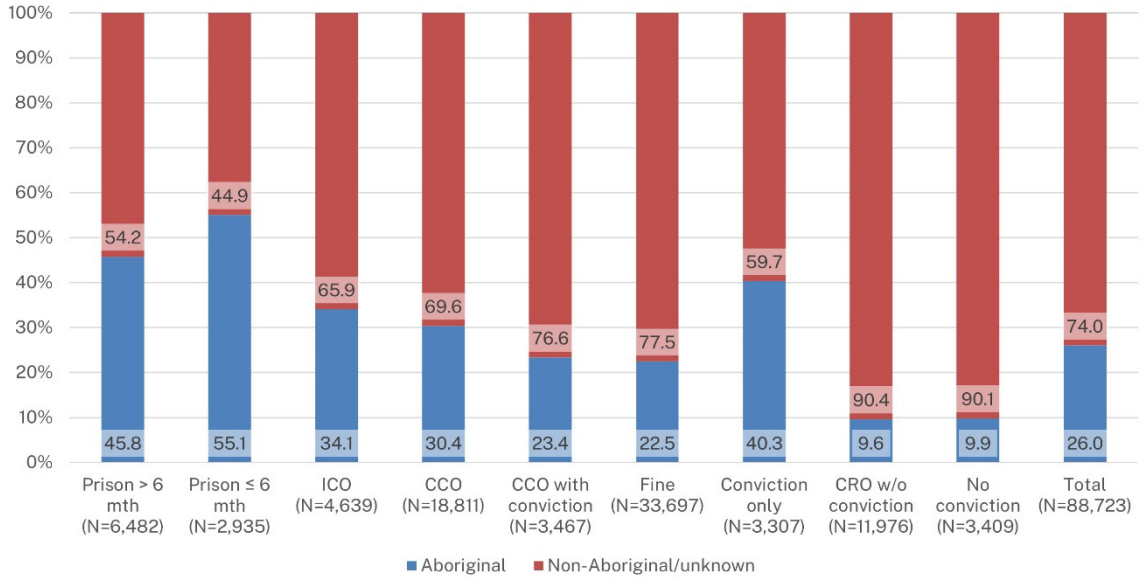
1.17 Considering that 26.0% of male offenders were recorded as Aboriginal:

- a large proportion (55.1%) of the 2,935 male offenders who received a sentence of imprisonment of 6 months or less were recorded as Aboriginal
- a large proportion (45.8%) of the 6,482 male offenders who received a sentence of imprisonment of more than 6 months were recorded as Aboriginal, and
- a large proportion (40.3%) of the 3,307 male offenders who received a conviction only were recorded as Aboriginal.

1.18 By contrast:

- a small proportion (9.6%) of the 11,976 male offenders who received a CRO without a conviction were recorded as Aboriginal, and
- a small proportion (9.9%) of the 3,409 male offenders who had no conviction recorded were recorded as Aboriginal.

Figure 1.4: NSW higher and local criminal courts, proportion of each penalty imposed on Aboriginal and non-Aboriginal men, 2023



Source: NSW Bureau of Crime Statistics and Research, reference 24-23463.
The data tables for this figure are in Appendix A.

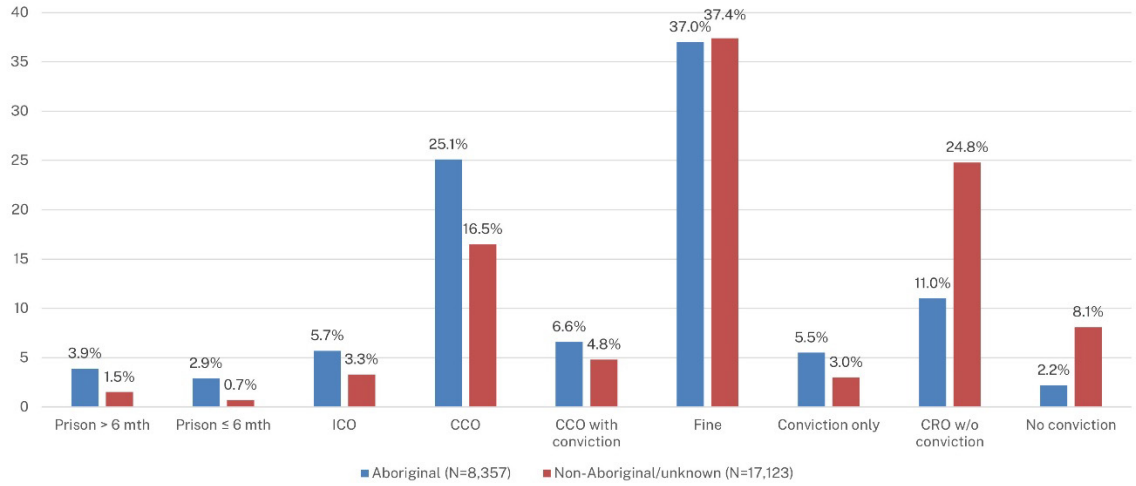
Aboriginal female offenders

1.19 There were 8,357 occasions on which Aboriginal women received a relevant sentence in 2023, compared with 17,123 occasions where women who were non-Aboriginal received a relevant sentence. According to these numbers, 32.8% of female offenders were recorded as Aboriginal. Aboriginal women represent 4.2% of the resident female population in NSW.[15]

1.20 Figure 1.5 shows the proportion of penalties imposed on female offenders by Aboriginal status. A much greater proportion of Aboriginal women received sentences of imprisonment (6.9% compared with 2.2%) and a much smaller proportion of Aboriginal women received a sentence that did not involve conviction (13.2% compared with 32.9%).

15. Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander* Australians, 30 June 2021 (retrieved 20 June 2024).

Figure 1.5: Distribution of penalties among Aboriginal women and non-Aboriginal women in NSW higher and local criminal courts, 2023



Source: NSW Bureau of Crime Statistics and Research, reference 24-23463.
The data tables for this figure are in Appendix A.

1.21 Figure 1.6 shows the percentage of Aboriginal women who received each penalty compared with non-Aboriginal women.

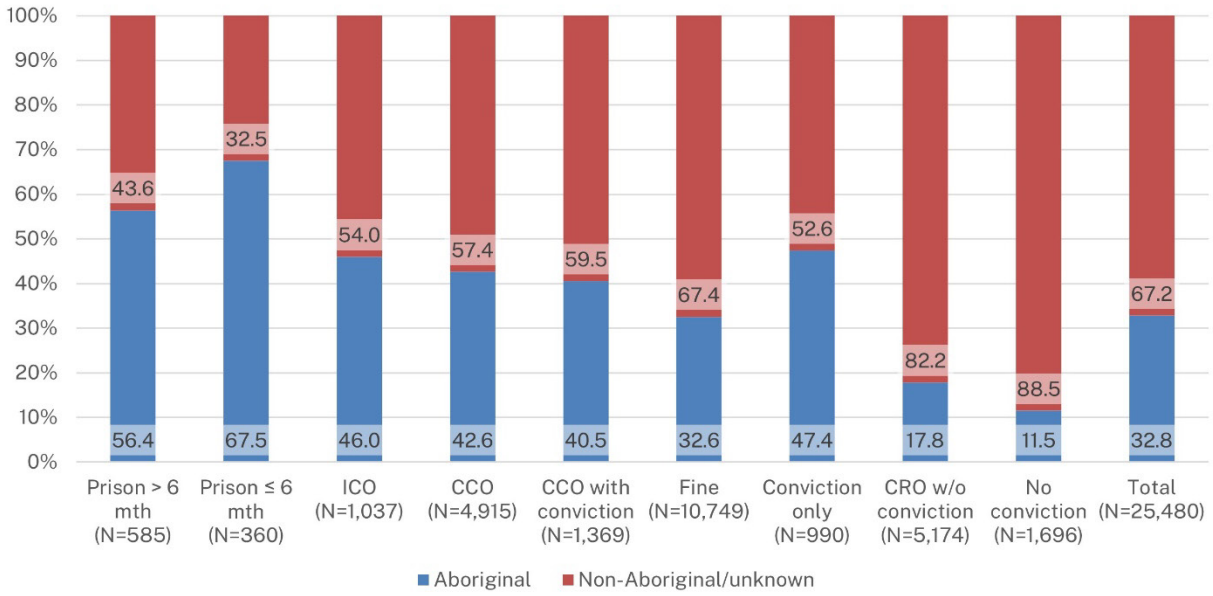
1.22 Considering that 32.8% of female offenders were recorded as Aboriginal:

- a large proportion (56.4%) of the 585 female offenders who received a sentence of imprisonment of more than 6 months were recorded as Aboriginal, and
- a large proportion (67.5%) of the 360 female offenders who received a sentence of imprisonment of 6 months or less were recorded as Aboriginal.

1.23 By contrast:

- a small proportion (17.8%) of the 5,174 female offenders who received a CRO without a conviction were recorded as Aboriginal, and
- a small proportion (11.5%) of the 1,566 women who had no conviction recorded were recorded as Aboriginal.

Figure 1.6: NSW higher and local criminal courts, percentage of each penalty imposed on Aboriginal and non-Aboriginal women, 2023



Source: NSW Bureau of Crime Statistics and Research, reference 24-23463.
The data tables for this figure are in Appendix A.

Regional data

1.24 Figure 1.7 sets out the proportion of offenders from each region who received a relevant penalty in 2019 – 2023.

1.25 The regions were identified using the accessibility/remoteness index, which measures a place's accessibility to goods, services and opportunities for social interaction:

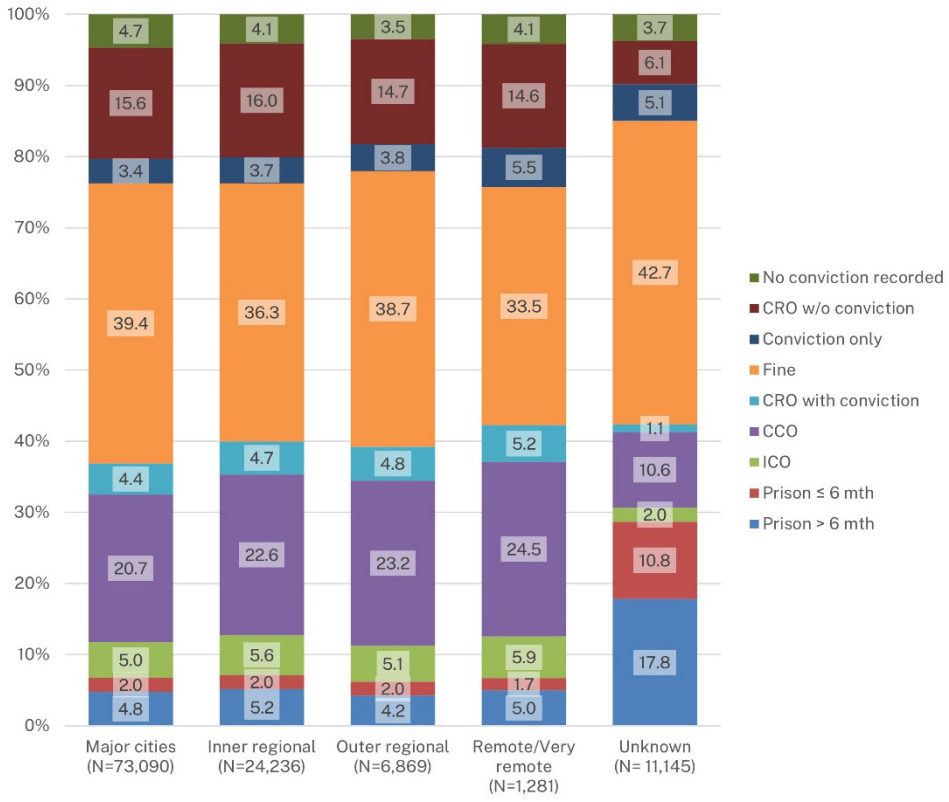
- **major cities** — relatively unrestricted accessibility to a wide range of goods, services and opportunities for social interaction
- **inner regional** — some restrictions to accessibility to some goods, services and opportunities for social interaction
- **outer regional** — significantly restricted accessibility to goods, services and opportunities for social interaction
- **remote** — very restricted accessibility to goods, services and opportunities for social interaction, and
- **very remote** — very little accessibility to goods, services and opportunities for social interaction.

1.26 It shows a generally even proportional distribution of penalties in the various regions. The more resource-intensive options, the ICO and the CCO, are relatively equally available in areas outside major cities. The two penalties were imposed in 28.2% of cases in inner regional communities, in 28.3% of cases in outer regional

communities and in 30.4% of cases in remote and very remote communities. On the other hand, they were imposed in proportionately fewer cases in major cities – in 25.8% of cases.

1.27 A large number of offenders did not have a region recorded (11,1145 of 116,621 instances in 2023). Many of these offenders received sentences of imprisonment.

Figure 1.7: NSW higher and local criminal courts, proportion of penalties imposed for each region, 2023



Source: NSW Bureau of Crime Statistics and Research, reference 24-23463.
The data tables for this figure are in Appendix A.

Discharge of sentencing orders

1.28 This section shows the data from Corrective Services NSW on the discharge of sentencing orders (ICOs, CCOs and CROs) showing the number that were:

- successfully completed
- revoked for breach, and
- discharged for other reasons.

1.29 In presenting this data, we note that:

- The counts are of orders, not offenders, so offenders with multiple orders have been counted multiple times.

- The data relates to the first full five years of operation of the new sentencing orders.
- The data for 2020 and 2021 may reflect the impact of COVID-19 on conditions, compliance and enforcement.

Intensive correction orders

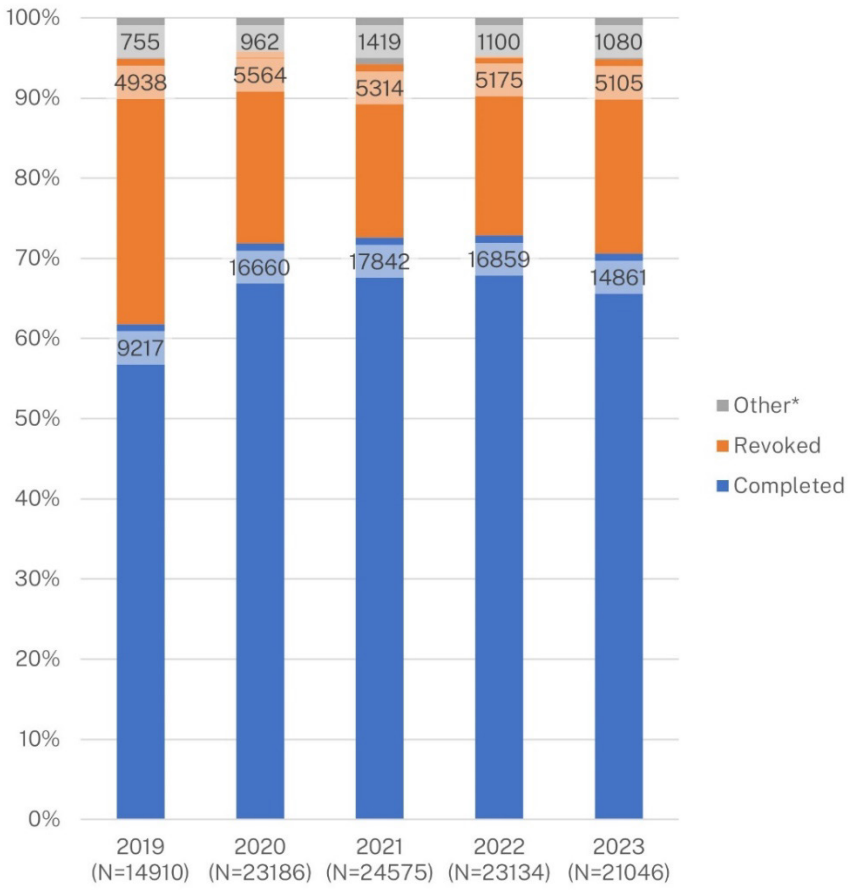
1.30 Figure 1.8 shows the numbers of ICOs that were discharged for 2019 – 2023.

1.31 In 2023, 21,046 ICOs were discharged. Of this number:

- 14,861 (70.6%) were discharged as the result of completing the ICO
- 5,105 (24.3%) were revoked, and
- 1,080 (5.1%) were discharged for other reasons (including transfers and deceased).

1.32 The percentage of revocations in 2023 was the highest percentage since 2019.

Figure 1.8: Discharge of intensive correction orders, 2019 – 2023



Source: Corrections Research Evaluation and Statistics, Response to request 1674.
* "Other" includes transfers, deceased and other.
The data tables for this figure are in Appendix A.

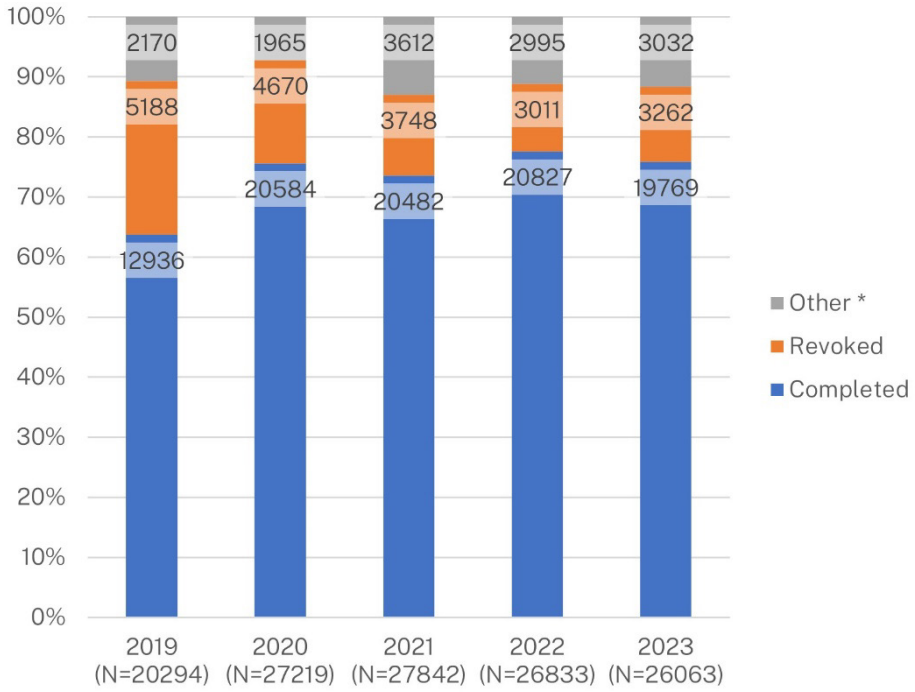
Community correction orders

1.33 Figure 1.9 shows the numbers of CCOs that were discharged for 2019 – 2023.

1.34 In 2023, 26,063 CCOs were discharged. Of this number:

- 19,769 (75.9%) were discharged as the result of completing the CCO
- 3,262 (12.5%) were revoked, and
- 3,032 (11.6%) were discharged for other reasons.

Figure 1.9: Discharge of community correction orders, 2019 – 2023



Source: Corrections Research Evaluation and Statistics, Response to request 1674.
* "Other" includes transfers, deceased and other.
The data tables for this figure are in Appendix A.

Conditional release orders

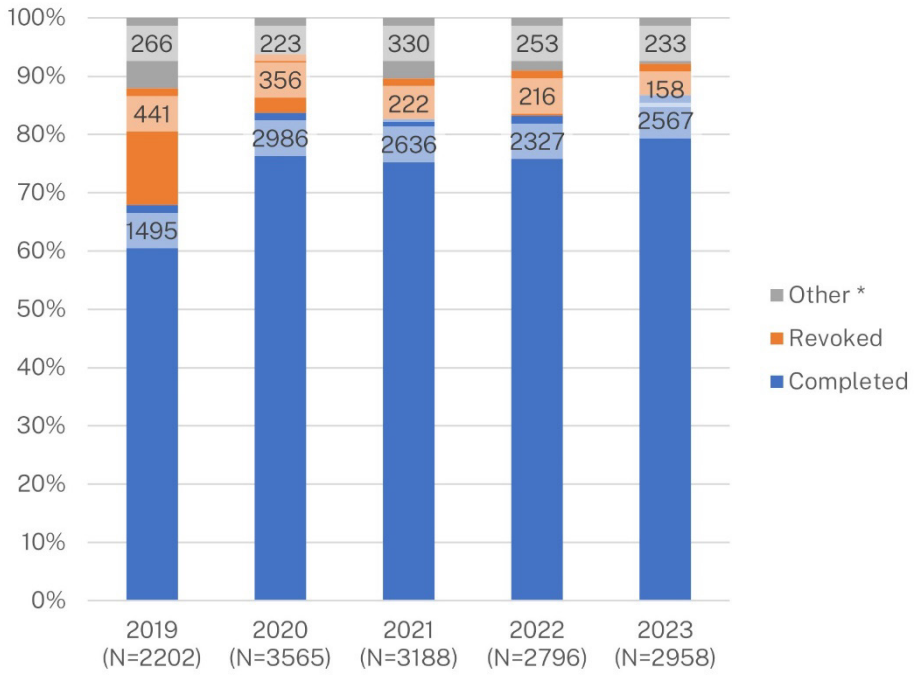
1.35 Figure 1.10 shows the numbers of CROs that were discharged for 2019 – 2023.

1.36 In 2023, 2,958 CROs (both with and without a conviction) were discharged. Of this number:

- 2,567 (86.8%) were discharged as the result of completing the CRO
- 158 (5.3%) were revoked, and
- 233 (7.9%) were discharged for other reasons.

1.37 The percentage of revocations was the lowest since the introduction of the penalty.

Figure 1.10: Discharge of conditional release orders, 2019 – 2023



Source: Corrections Research Evaluation and Statistics, Response to request 1674.
* "Other" includes transfers, deceased and other.
The data tables for this figure are in Appendix A.

Breach and revocation of sentencing orders

1.38 This section examines how courts dealt with breaches of sentencing orders.

1.39 In presenting this data, we note:

- The orders breached include orders imposed before the 2018 sentencing reforms that were converted to the new orders for administrative purposes. Different risk profiles may have applied to offenders who were subject to the converted orders.
- The COVID-19 pandemic may have impacted on conditions, compliance and enforcement in 2020 and 2021.

Conditional release orders

1.40 CROs may be imposed with or without a conviction.

1.41 An offender who is subject to a CRO may be called to appear before a court, if it is suspected that the offender has failed to comply with any of the conditions of the CRO.[16]

16. *Crimes (Administration of Sentences) Act 1999* (NSW) s 108C(1).

1.42 If the court is satisfied that the offender failed to comply with a condition, the court:

(a) may decide to take no action in respect of the failure to comply, or

(b) may vary or revoke any conditions of the order (other than standard conditions) or impose further conditions on the order, or

(c) may revoke the order.[17]

1.43 If the court revokes a CRO, it may sentence or re-sentence the offender for the offence to which the revoked order relates.[18]

Number of CROs where the courts established breach

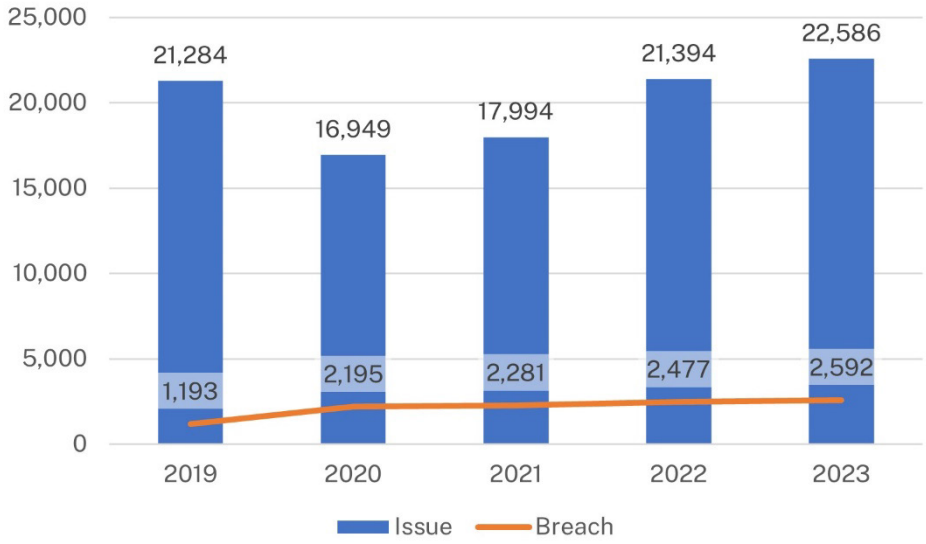
1.44 The following figures set out the number of CROs that a court found were breached. They are divided into CROs without a conviction and CROs with a conviction.

1.45 Figure 1.11 shows the number of **CROs without a conviction** that a court found were breached for 2019 – 2023 (indicated by the orange line). The figure records findings for each CRO. It may be that a single offender breached multiple, concurrent CROs. In 2023, offenders breached one or more CROs without a conviction on 1,913 appearances. Of these, 1,467 (76.7%) involved a breach of one order. The remainder (23.3%) involved breaches of two or more orders.[19]

1.46 In 2023, 2,592 **CROs without a conviction** were found to have been breached. By way of comparison, in 2023, the courts issued 22,586 CROs without a conviction (these are indicated by the blue columns). Note that some of the breaches relate to CROs that were issued in years before 2023.

17. *Crimes (Administration of Sentences) Act 1999* (NSW) s 108C(5).
18. *Crimes (Administration of Sentences) Act 1999* (NSW) s 108D.
19. NSW Bureau of Crime Statistics and Research, reference 24-23456.

Figure 1.11: Number of conditional release orders without a conviction breached, compared with number issued, 2019 – 2023



Source: NSW Bureau of Crime Statistics and Research, reference st24-23455.
The data tables for this figure are in Appendix A.

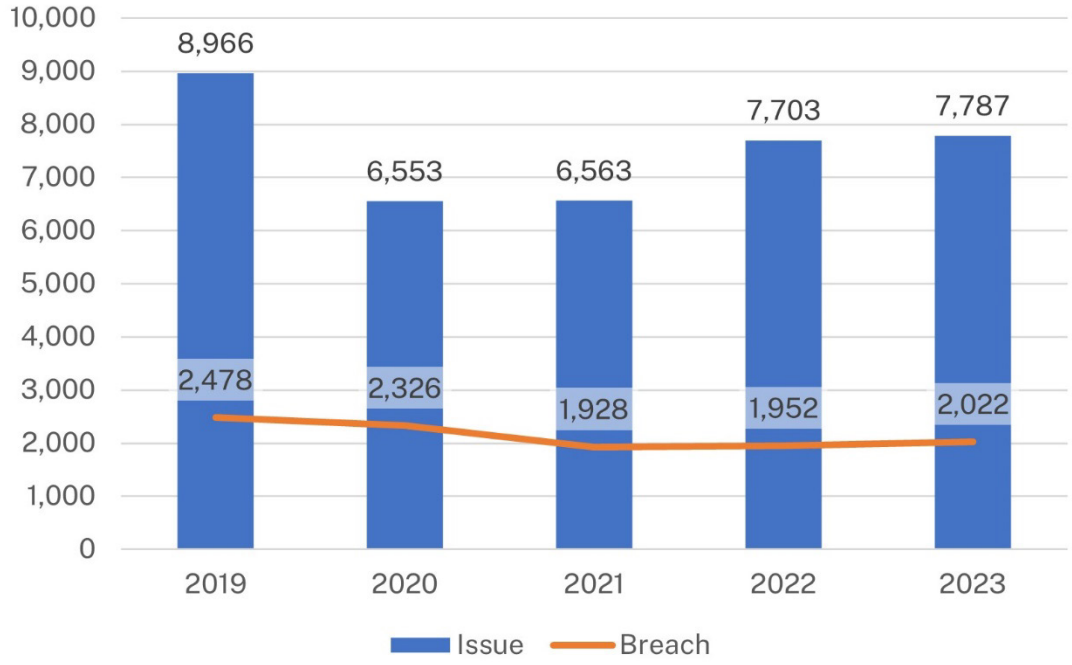
1.47 Figure 1.12 shows the number of **CROs with a conviction** that a court found were breached for 2019 – 2023 (indicated by the orange line).

1.48 The figure records findings in relation to each CRO. It may be that a single offender breached multiple CROs that were running concurrently. In 2023, offenders breached one or more CROs with a conviction on 1,333 appearances. Of these, 889 (66.7%) involved breach of one order. The remainder (33.3%) involved breaches of two or more orders.[20]

1.49 In 2023, 2,022 CROs with a conviction were found to have been breached. By way of comparison, in 2023, the courts issued 7,787 CROs with a conviction (these are indicated by the blue columns). Note that some of the breaches relate to CROs that were issued in years before 2023.

20. NSW Bureau of Crime Statistics and Research, reference 24-23456.

Figure 1.12: Number of conditional release orders with a conviction breached, compared with number issued, 2019 – 2023



Source: NSW Bureau of Crime Statistics and Research, reference st24-23455.
The data tables for this figure are in Appendix A.

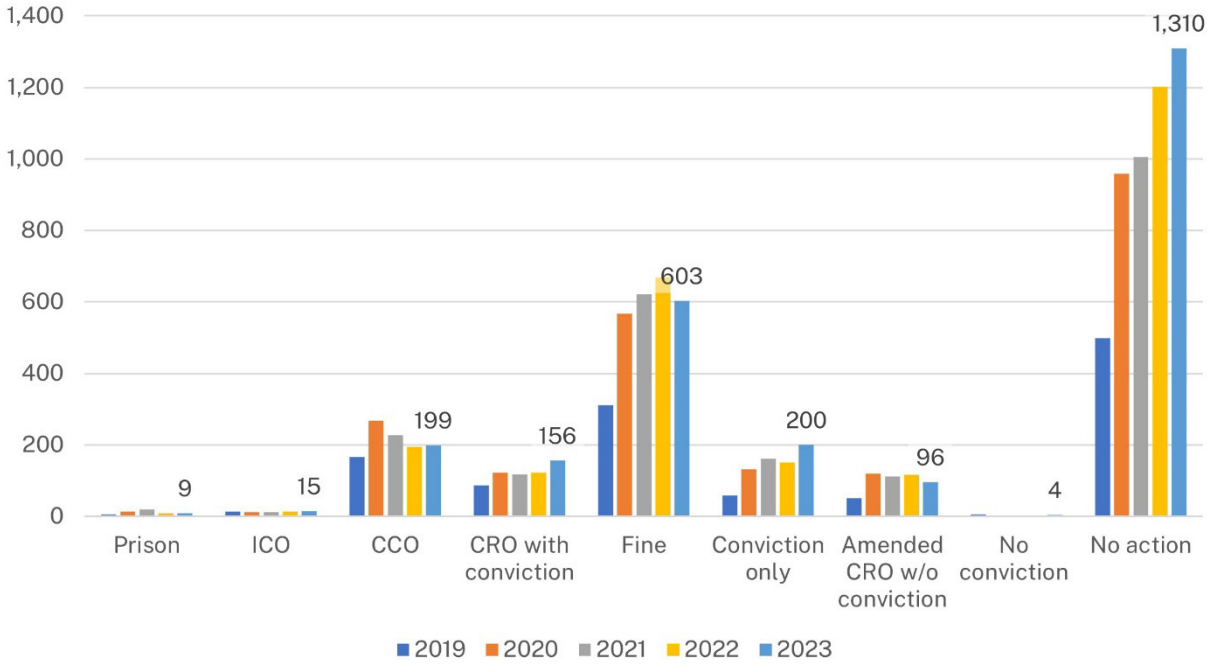
Outcomes of breaches that were referred to court

1.50 The following figures show the number of outcomes for each breached CRO in 2019 – 2023. They are divided into CROs without a conviction and CROs with a conviction.

1.51 The very small number of cases of imprisonment may have been imposed primarily in relation to the offences by which the offender breached the CRO.

1.52 Figure 1.13 shows the number of options employed by the courts when offenders breached the conditions of **CROs without a conviction recorded** in 2019 – 2023.

Figure 1.13: Outcomes of breach (number) for each conditional release order without a conviction, 2019 – 2023



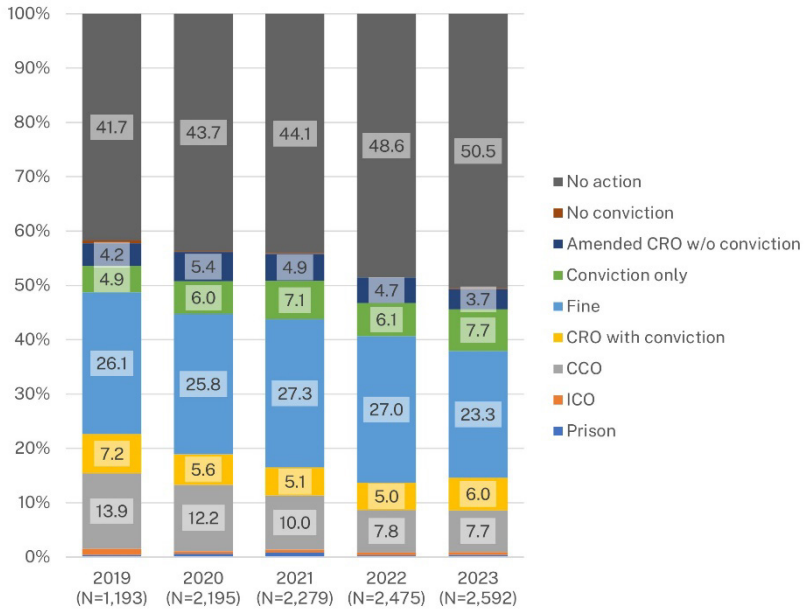
Source: NSW Bureau of Crime Statistics and Research, reference st24-23455.
The data tables for this figure are in Appendix A.

1.53 Figure 1.14 shows the proportion of outcomes for each breached **CRO without a conviction**. In 2023, the courts decided to take no action on 50.5% of the breached orders. For 23.3% of the breached orders the courts imposed a fine. The court amended the conditions of the order in only 3.7% of cases.

1.54 There was a proportionately greater reliance on fines when dealing with breaches of CROs without a conviction compared with CROs with a conviction.

1.55 There has been a decline in the proportion of CCOs imposed as a result of breaching a relevant order since 2019 (from 13.9% in 2019 to 7.7% in 2023).

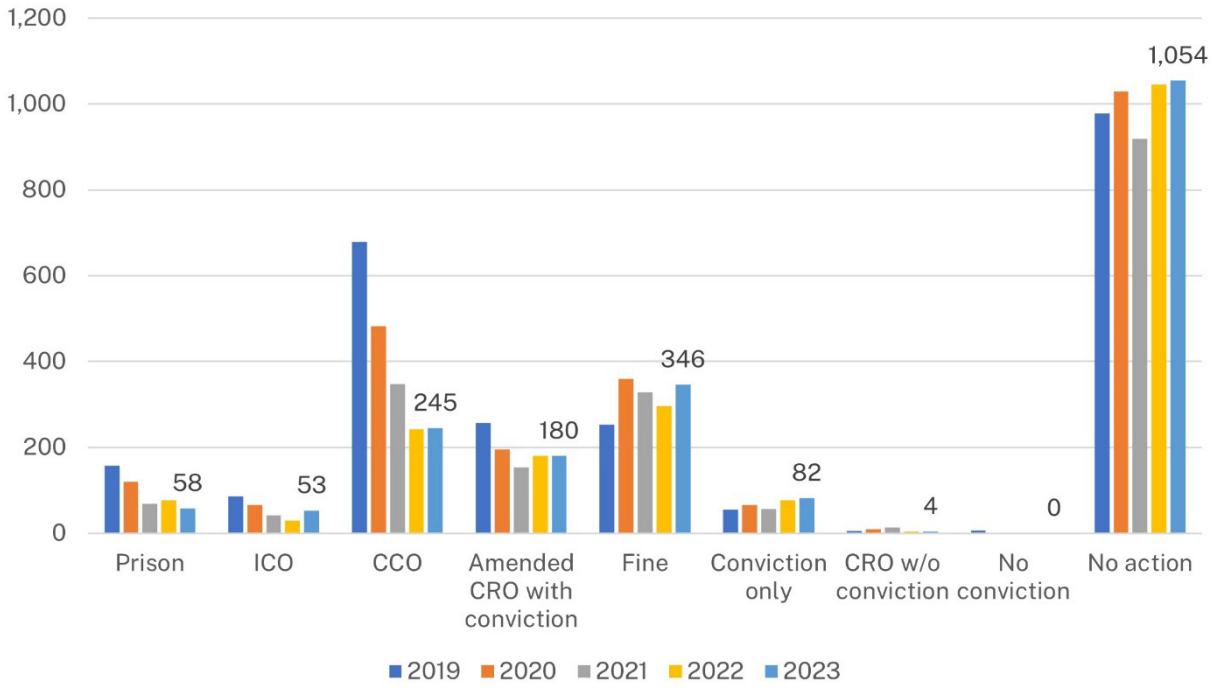
Figure 1.14: Outcomes of breach (percentage) for each conditional release order without a conviction, 2019 – 2023



Source: NSW Bureau of Crime Statistics and Research, reference st24-23455
The data tables for this figure are in Appendix A.

1.56 Figure 1.15 shows the number of options employed by the courts when offenders breached the conditions of **CROs with a conviction** recorded in 2019 – 2023.

Figure 1.15: Outcomes of breach (number) for each conditional release order with a conviction, 2019 – 2023



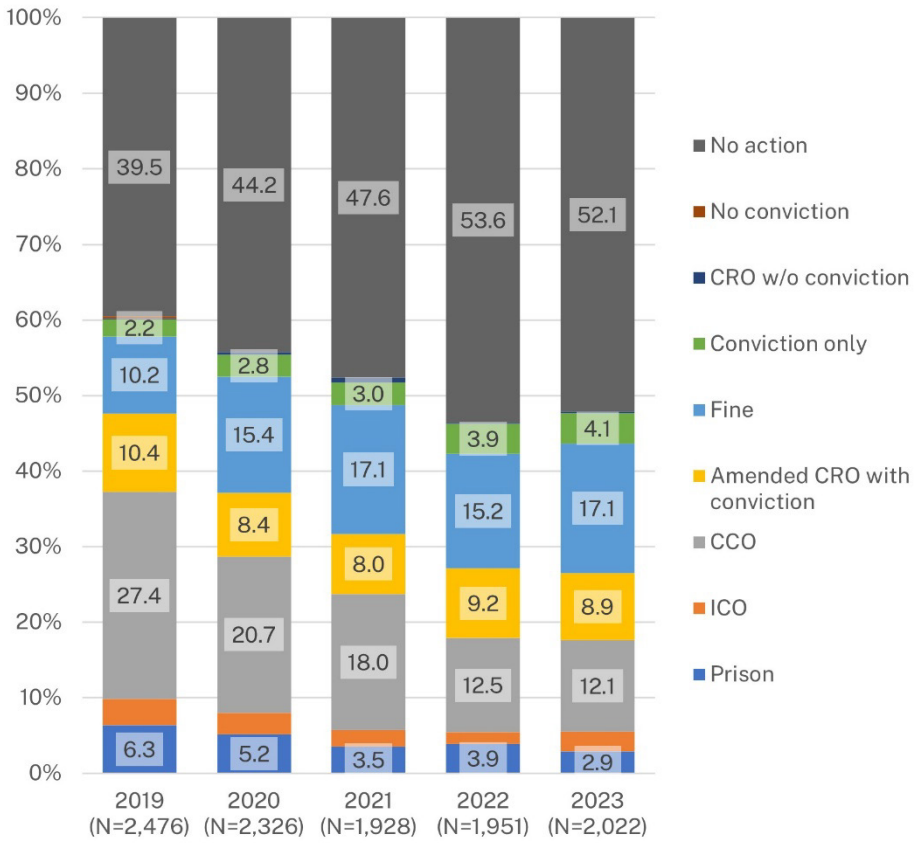
Source: NSW Bureau of Crime Statistics and Research, reference st24-23455.
The data tables for this figure are in Appendix A.

1.57 Figure 1.16 shows the proportion of outcomes for each breached **CRO with a conviction**.

1.58 In 2023, the courts decided to take no action on 52.1% of the breached orders. The courts imposed a fine for 17.1% of breached orders and a CCO for 12.1% of breached orders. The court amended the conditions of the order in only 8.9% of cases.

1.59 Since 2019, there has been an increase in the proportion of breaches responded to by no action (from 39.5% in 2019 to 52.1% in 2023) and by a fine (10.2% in 2019 to 17.1% in 2023). There has also been a decrease in the proportion of breaches for which the courts have imposed a CCO (from 27.4% in 2019 to 12.1% in 2023).

Figure 1.16: Outcomes of breach (perecentage) for each conditional release order with a conviction, 2019 – 2023



Source: NSW Bureau of Crime Statistics and Research, reference st24-23455.
The data tables for this figure are in Appendix A.

Community correction orders

1.60 An offender who is subject to a CCO may be called to appear before a court, if it is suspected that the offender has failed to comply with any of the order's conditions.[21]

1.61 If the court is satisfied that the offender failed to comply with a condition, the court:

(a) may decide to take no action in respect of the failure to comply, or

(b) may vary or revoke any conditions of the order (other than standard conditions) or impose further conditions on the order, or

(c) may revoke the order.[22]

1.62 If the court revokes a CCO, it may re-sentence the offender for the offence to which the revoked order relates.[23]

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21. *Crimes (Administration of Sentences) Act 1999* (NSW) s 107C(1).
22. *Crimes (Administration of Sentences) Act 1999* (NSW) s 107C(5).
23. *Crimes (Administration of Sentences) Act 1999* (NSW) s 107D.

Number of CCOs where the courts established breach

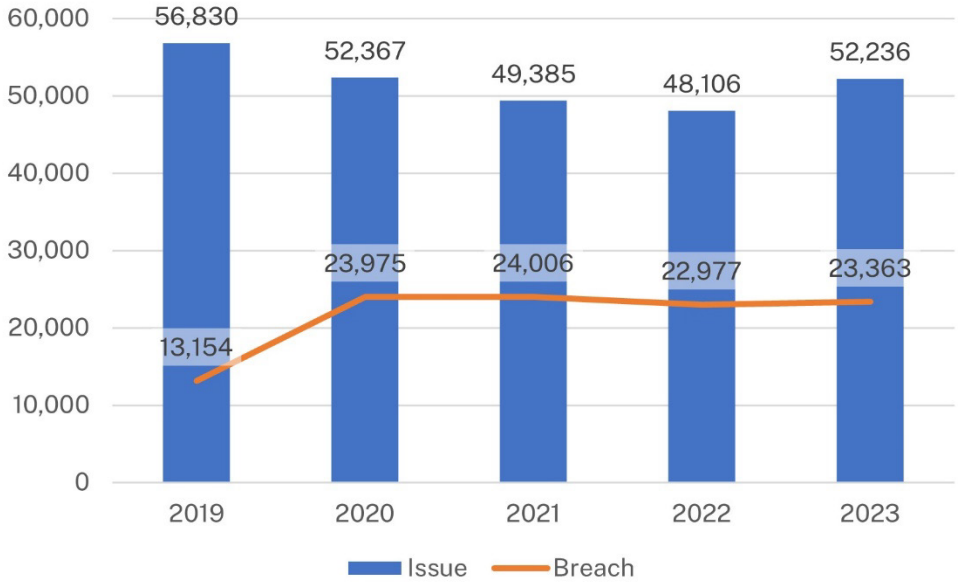
1.63 Figure 1.17 shows the number of instances where a court found that an offender breached the conditions of a CCO in 2019 – 2023 (indicated by the orange line).

1.64 The figure records each finding in relation to each CCO. It may be that a single offender breached multiple, concurrent CCOs. In 2023, offenders breached one or more CCOs on 10,620 appearances. Of these, 4,925 (46.4%) involved breach of one order. The remainder (53.6%) involved breaches of two or more orders.[24]

1.65 In 2023, 23,363 CCOs were found to have been breached (these are indicated by the orange line). By way of comparison, in 2023, courts issued 52,236 CCOs (these are indicated by the blue columns).

1.66 The increase in numbers between 2019 and 2020 (13,154 CCOs breached in 2019 to 23,975 breached in 2020) is to be expected as more CCOs enter the system. The numbers appear to have levelled out in later years.

Figure 1.17: Number of community correction orders breached, compared with number issued, 2019 – 2023



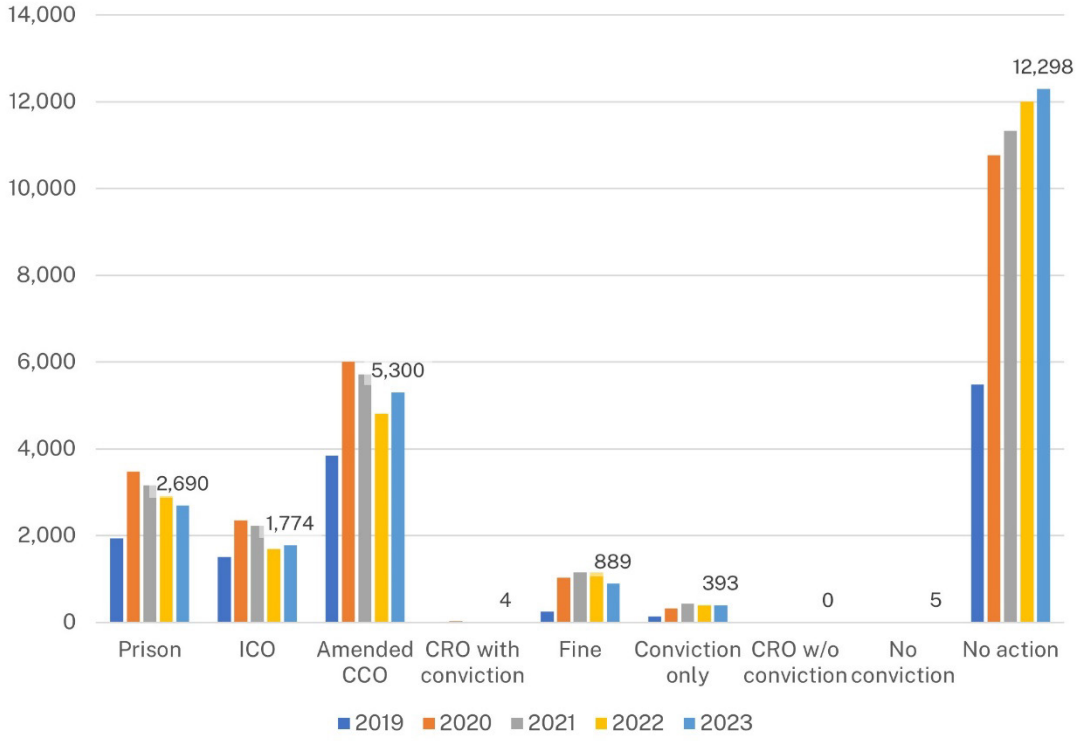
Source: NSW Bureau of Crime Statistics and Research, reference st24-23455.
The data tables for this figure are in Appendix A.

Outcomes of breaches that were referred to court

1.67 Figure 1.18 shows the number of outcomes for each breached CCO in 2019 – 2023.

24. NSW Bureau of Crime Statistics and Research, reference 24-23456.

Figure 1.18: Outcomes of breach (number) for each community correction order, 2019 – 2023

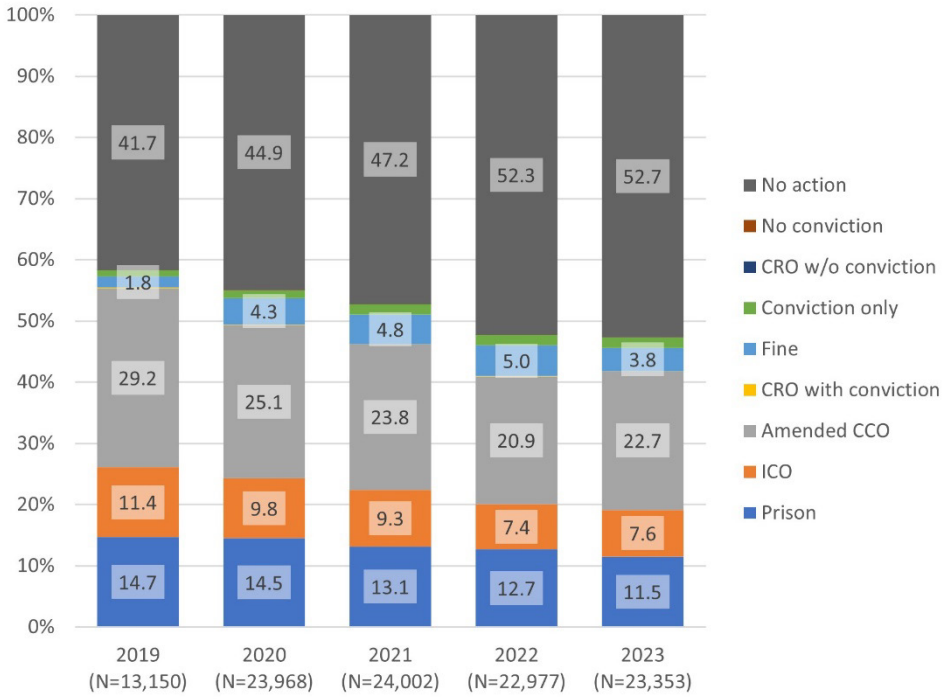


Source: NSW Bureau of Crime Statistics and Research, reference st24-23455.
The data tables for this figure are in Appendix A.

1.68 Figure 1.19 shows the proportion of outcomes for each breached CCO. In 2023, the courts took no action on the breach for 52.7% of breached orders. The court amended one or more conditions of the CCO for 22.7% of breached CCOs. For a further 19.1%, the court imposed a harsher penalty – either an ICO or imprisonment.

1.69 The proportion of instances where a court took no action on a breached CCO increased from 41.7% in 2019 to 52.7% in 2023. The proportion of instances where a court imposed an ICO decreased from 11.4% in 2019 to 7.6% in 2023, and where a court imposed an amended CCO decreased from 29.2% in 2019 to 22.7% in 2023.

Figure 1.19: Outcomes of breach (percentage) for each community correction order, 2019 – 2023



Source: NSW Bureau of Crime Statistics and Research, reference st24-23455.
The data tables for this figure are in Appendix A.

Intensive correction orders

1.70 There are two responses to breaches ICOs relating to NSW offences:

- less serious breaches are managed locally by Community Corrections, and
- more serious breaches are referred to the State Parole Authority (SPA) for determination.

1.71 The conditions that may be breached include the standard conditions that apply to all ICOs:

- the offender must not commit any offence, and
- the offender must submit to supervision by a community corrections officer.[25]

1.72 Additional conditions that a court can impose, include:

- home detention
- electronic monitoring
- a curfew
- community service work

25. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 73(2).

- a requirement that the offender participate in a rehabilitation program or receive treatment
- a requirement that the offender refrain from using alcohol and/or drugs, and
- a place restriction.[26]

1.73 SPA must be satisfied that there has been a breach when determining a matter. If SPA is satisfied that there has been a breach, it may take any of the following actions:

(a) record the breach and take no further action,

(b) give a formal warning to the offender,

(c) impose any conditions on the intensive correction order,

(d) vary or revoke any conditions of the intensive correction order, including conditions imposed by the sentencing court,

(e) make an order revoking the intensive correction order (a revocation order).[27]

Breached conditions

1.74 The majority of ICOs revoked by the SPA were revoked for breaches of two or more conditions.

1.75 The two most commonly breached conditions in 2023 were the standard conditions that apply to all ICOs:

- the offender must not commit any offence – found at 1359 hearings, and
- the offender must submit to supervision by a community corrections officer – found at 636 hearings.

1.76 Figure 1.20 shows the number of breaches of conditions that led to the revocation of an ICO in 2019 – 2023.

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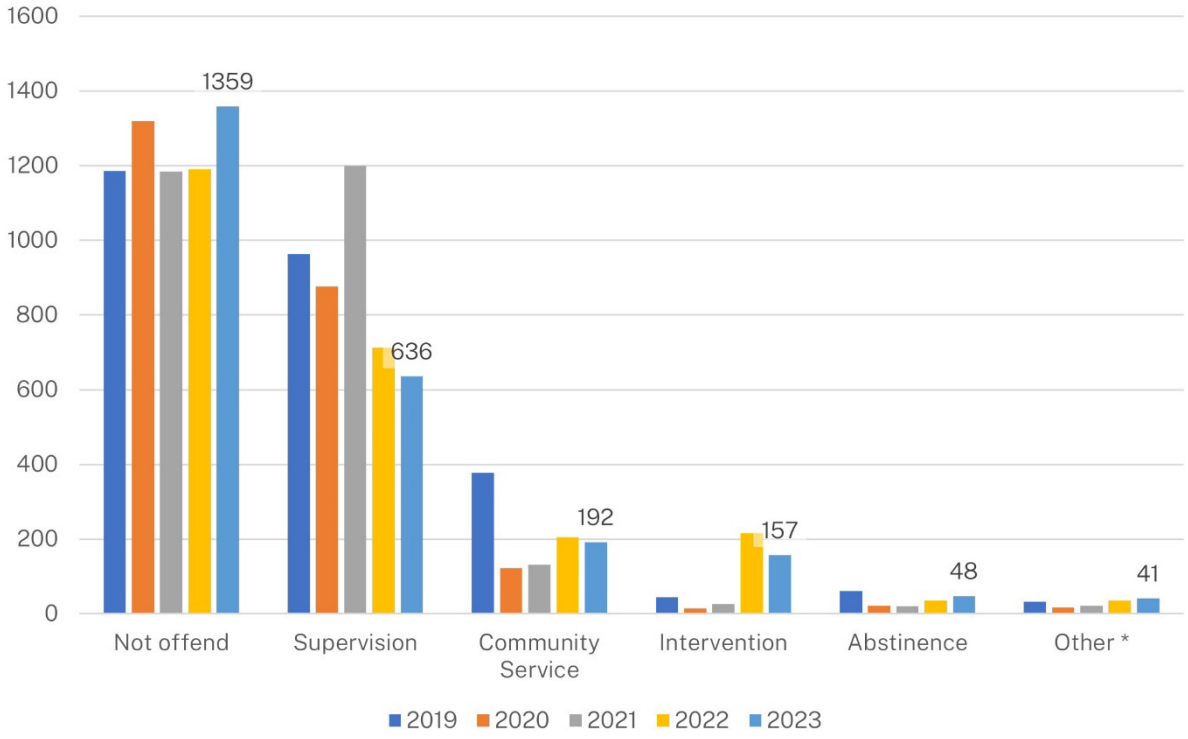
26. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 73A(2).
27. *Crimes (Administration of Sentences) Act 1999* (NSW) s 164(2) (emphasis omitted).

Figure 1.20: Conditions breached resulting in revocation of an ICO, 2019 – 2023



Source: Corrections Research Evaluation and Statistics, Response to request 1674.
* Other: Home detention, Electronic monitoring, Non association, Curfew, Place restriction.
The data tables for this figure are in Appendix A.

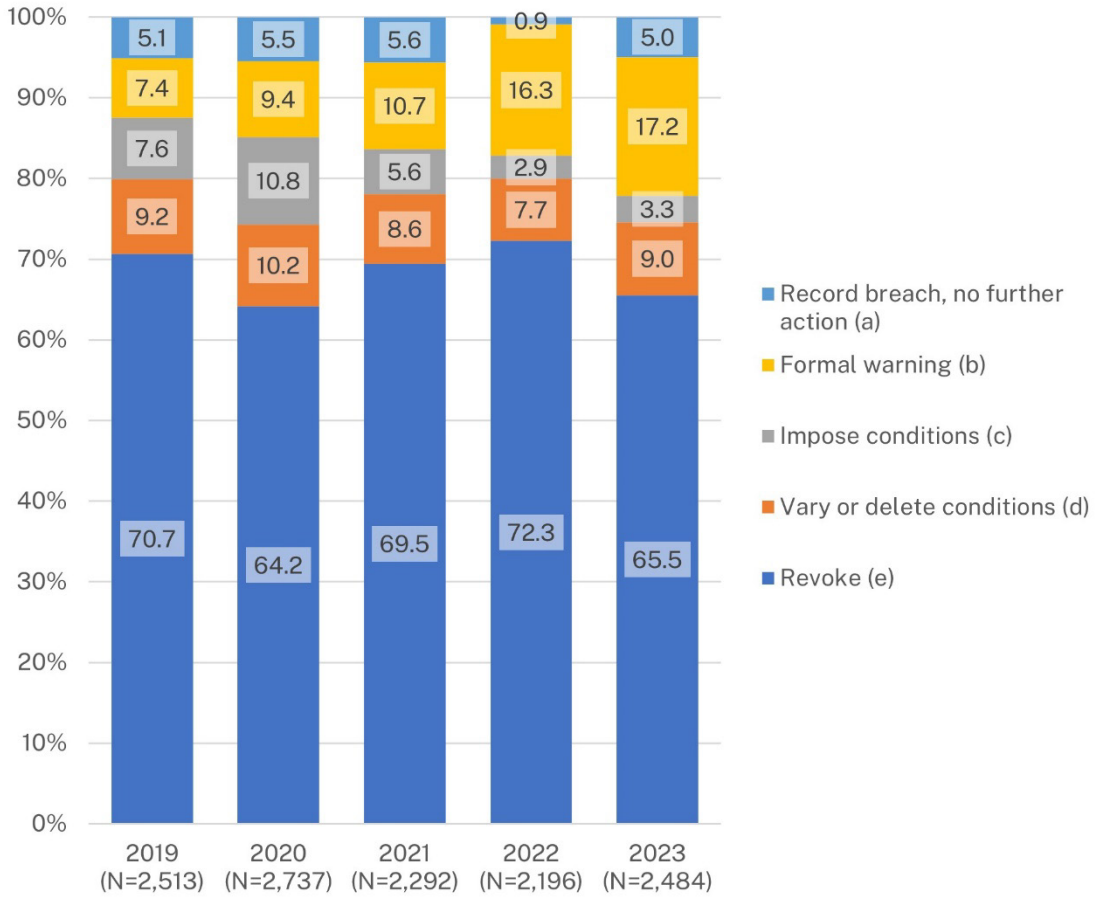
Outcomes of breaches that were referred to the Parole Authority

1.77 In 2023, there were 2,484 hearings where SPA was satisfied that an offender breached an ICO condition and ordered one of the outcomes permitted by the *Crimes (Administration of Sentences) Act 1999* (NSW). The most common outcomes were:

- revocation – at 1,628 hearings (65.5%)
- issuing a formal warning – at 427 hearings (17.2%), and
- varying or deleting conditions – at 224 hearings (9.0%).

1.78 Figure 1.21 shows the outcomes of hearings where SPA was satisfied that a breach of an ICO condition had occurred in 2019 – 2023. It shows an increasing reliance on formal warnings (from 7.4% to 17.2%). The proportion of cases resulting in revocation appears to have returned to pre-pandemic levels.

Figure 1.21: Outcomes where Parole Authority was satisfied a breach occurred, 2019 – 2023



Source: Corrections Research Evaluation and Statistics, Response to request 1674.
The data tables for this figure are in Appendix A.

Reinstatement after revocation

1.79 After an ICO has been revoked and an offender has served at least one month in full-time custody, SPA may, on an offender's application, reinstate the ICO.[28] The application must state what the offender did or is doing to ensure that they will not fail to comply with a reinstated ICO.[29]

1.80 Figure 1.22 shows the outcomes of reinstatement applications for ICOs in 2019 – 2023. In 2023, SPA reinstated ICOs on 253 occasions. SPA did not add or delete any conditions upon reinstatement. These numbers continue the trend of neither adding nor deleting conditions upon reinstatement.

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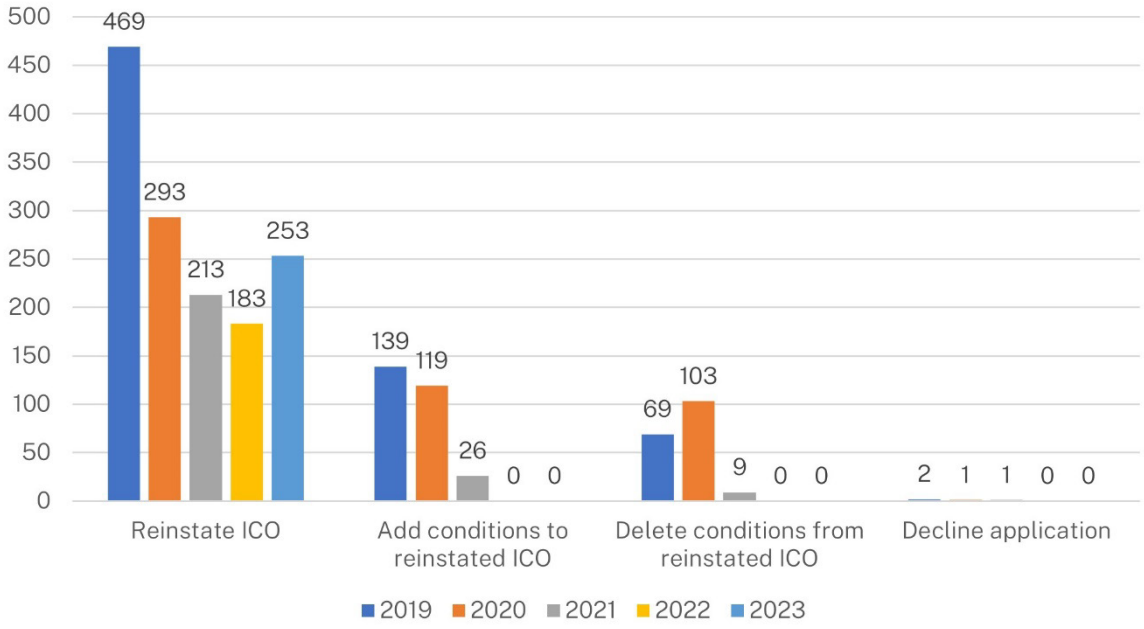
28. *Crimes (Administration of Sentences) Act 1999* (NSW) s 165.
29. *Crimes (Administration of Sentences) Act 1999* (NSW) s 165(2)(b).

Figure 1.22: Outcomes of reinstatement applications for intensive correction orders, 2019 – 2023



Source: Corrections Research Evaluation and Statistics, Response to request 1674.
The data tables for this figure are in Appendix A.

2. Sentencing related research

2.1 This chapter summarises notable research in 2023 relating to the operation of sentencing in NSW. The research was undertaken or sponsored by a variety of bodies, including the NSW Bureau of Crime Statistics and Research (BOCSAR), NSW Corrections Research Evaluation and Statistics, and the Australian Institute of Criminology.

Evaluation of Local Coordinated Multiagency offender management

2.2 This study,[1] published by BOCSAR, evaluated whether Local Coordinated Multiagency (LCM) offender management is associated with a lower likelihood and lower seriousness of recidivism among those offenders assessed as having a medium to high risk of reoffending. LCM offender management is a multiagency approach that provides tailored case management and wraparound support services to offenders under Community Corrections supervision.

2.3 LCM has been operating since September 2017. The NSW Department of Communities and Justice, the NSW Police Force and NSW Health work together to provide additional case management support to offenders on top of the usual Community Corrections supervision received while on parole or serving a supervised community-based court order.

1. S Rahman, *An Evaluation of Local Coordinated Multiagency (LCM) Offender Management,* Crime and Justice Bulletin No 257 (NSW Bureau of Crime Statistics and Research, 2023).

2.5 In addition to any rehabilitation programs, this support includes referrals to:

- housing services
- disability services
- health and mental health services
- drug and alcohol services
- victim services, and
- relationship services.

2.6 The goal of LCM is to reduce the reoffending risk of medium to high risk reoffenders by identifying their individual risks and needs, tailoring services and using police monitoring to manage their risk areas, and to help stabilise the offender.

2.7 BOCSAR used a dataset of 711 Community Corrections episodes involving individuals referred to LCM and 49,574 other Community Corrections orders between 1 September 2017 and 31 March 2021. They compared reoffending rates between LCM offenders and a matched control group.

2.8 They assessed reoffending in terms of four outcomes:

- any reoffending
- serious drug, violent, and property reoffending
- domestic violence reoffending, and
- return to custody within 12 months of referral.

This was supplemented by an event study analysis, comparing LCM offenders' patterns of offending, before and after referral, with offenders on similar orders in or around the same period.

2.9 The study used two methods to evaluate the effectiveness of LCM. The first approach was to examine whether LCM offenders reoffended less than a group of observably similar offenders who were not referred to LCM. The second approach involved comparing the offending rates of participants in the program before and after referral with a matched control group consisting of offenders who were serving similar orders at around the same time. The goal was to identify if LCM was associated with changes in outcomes within 12 months of being referred to the program.

2.11 It was observed that offenders who refused to engage with the program were:

- 17.6% more likely to reoffend
- 13.2% more likely to have serious drug, violent or property reoffending, and
- 24.4% more likely to return to custody with 12 months.

2.12 Conversely, offenders who successfully completed the program were:

- 12% less likely to reoffend at all
- 10.7% less likely to have serious drug, violent or property reoffending, and
- 13.4% less likely to return to custody within 12 months.

2.13 Overall, the study concluded that LCM was not associated with any significant changes in reoffending, serious drug, violent or property reoffending, or domestic violence reoffending, and may actually be associated with higher return to custody rates. This was because only one quarter of participants successfully completed the LCM program and data shows that those who did not successfully complete the program had much higher rates of offending.

2.14 The study noted several factors may have contributed to this result:

- It may be more likely that LCM participants would be detected for offending while on the program.
- The absence of a treatment effect for LCM could be due to low engagement rates with the program and selection bias due to unobserved multiagency needs that the study could not account for.
- It is possible that because rehabilitation was gradual, the effects of participation had not yet become apparent.

Why are Aboriginal adults less likely to receive cannabis cautions?

2.15 This study,[2] published by BOCSAR, examined differences in cannabis cautioning rates under the Cannabis Cautioning Scheme between Aboriginal and non-Aboriginal adults in NSW, and the extent to which the disparities could be explained by factors such as eligibility criteria, legal, and other observed characteristics.

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2. A Teperski and S Rahman, *Why are Aboriginal Adults Less Likely to Receive Cannabis Cautions?* Crime and Justice Bulletin No 258 (NSW Bureau of Crime Statistics and Research, 2023).

2.16 The study examined a data sample of 38,813 events involving a cannabis possession offence[3] from January 2017 to February 2020. Data showed a large gap between the cautioning rates for Aboriginal people (11.7%) and non-Aboriginal people (43.9%) found in possession of cannabis.

2.17 The study found that this difference was largely explained by eligibility criteria and offender characteristics.

2.18 The difference in caution rates was mostly due to an offender's eligibility for the Cannabis Cautioning Scheme, with 78.4% of Aboriginal people in the study not meeting at least one of the eligibility criteria specified under the Cannabis Cautioning Scheme. This compared to 45.7% of non-Aboriginal people who did not meet at least one of the eligibility criteria.

2.19 To be eligible for the Cannabis Cautioning Scheme an offender must meet the following criteria:

- the offender must possess no more than 15 grams of dried cannabis and/or equipment for the use of cannabis
- the offender must be an adult
- the identity of the offender must be confirmed (typically by sighting identification)
- sufficient evidence to prosecute the offender must exist
- the drug must be for personal use only
- the offender must not be involved in any criminal offence at the time, for which a brief of evidence would be submitted
- the offender must have no prior convictions for drug, violent or sexual offences
- the offender must admit to the offence
- the offender must consent to the caution and sign a caution notice
- the caution must be appropriate, and
- the offender must not have been issued two or more previous cannabis cautions.

2.20 Although 70.5% of eligible offenders were issued with a caution, a significant disparity was found between cautioning rates for eligible Aboriginal people (39.5%) and eligible non-Aboriginal people (73.9%) in possession of cannabis.

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3. *Drug Misuse and Trafficking Act 1985* (NSW) s 10–11, s 12.

2.21 Most of this disparity is explained by factors relating to criminal history such as:

- the number of prior court appearances
- the type of prior offending (for prior offences unrelated to Cannabis Cautioning Scheme eligibility), and
- whether an offender has previously been to prison.

2.22 Most of the remaining disparity is explained by non-legal factors including:

- Police Area Command level factors that influence cautioning decisions such as fixed budgeting allocations, Police Area Command culture or commander preferences, and
- demographic characteristics including age, gender, remoteness, and socioeconomic status.

2.23 The study concluded that the disparities in cautioning rates are likely to continue without:

- policies to reduce the over representation of Aboriginal people in the justice system
- a reduction to the scope for police discretion when issuing cautions, or
- changes to the Cannabis Cautioning Scheme eligibility criteria.

Homelessness and predictors of criminal reoffending

2.24 This study, published in *Criminal Behaviour and Mental Health*,[4] examined the interactions in NSW of people experiencing homelessness with the criminal justice system over time. Among a group of people who attended mental health clinics at three hostels for homeless people in a 12.5-year period from 2008 to 2020, the study found high rates of mental health issues, offending and reoffending.

2.25 The study analysed data for 1646 people who attended a clinic and who were charged with an index offence, which was finalised during the study period (the cohort). In contrast, 852 people attended a clinic but did not have contact with the criminal justice system in that period.

2.26 The study looked at criminal offences, health, mortality and clinic data on the cohort to identify the kinds of offences committed, court outcomes, predictors of

4. R Mitchell and others, "Homelessness and Predictors of Criminal Reoffending: A Retrospective Cohort Study" (2023) 33 *Criminal Behaviour and Mental Health* 261.

reoffending and estimated court costs. One limitation was that the study was confined to three homeless hostels in Sydney, two of which were for men only.

2.27 The study looked at data on criminal offences from the Reoffending Database for the study period. The study recognised that offending would be underestimated as the data was confined to crimes that came to the attention of police. The first principal offence in the study period was treated as the "index offence". If there were multiple offences, the study used the proven index offence with the most serious penalty.

2.28 An average of 10.2 offences were finalised for each member of the cohort in the study period. The main index offences committed were acts intended to cause injury, drug offences or theft and related offences. Guilty findings were made for 1418 of the cohort. Of these, 601 received a fine and 509 received a supervised or unsupervised community-based sentence. Mental health dismissals were received by 117 individuals.

2.29 Of the cohort:

- 97.7% had at least one diagnosed mental disorder (other than a substance use disorder; most commonly schizophrenia, anxiety or depression)
- 94.4% were male
- 87.9% had a substance use disorder identified at the clinic
- 64.5% had been homeless for over 1 year
- 62% were 35 years or older
- 51.9% reported not adhering to prescribed psychotropic medication
- 45% had a history of trauma (as a child or adult), and
- 12.6% died during the study period.

2.30 The study did not have information about whether members of the cohort were homeless throughout the study period, or about their medication use.

2.31 The study also looked at the cohort's use of health services using information from emergency department presentations and admissions, public hospital ambulatory specialist mental health services and homeless clinic client records. In the 12 months after their index offence was finalised, an individual in the cohort had, on average 1.3 hospital admissions, 3.3 emergency department presentations and 13.8 contacts with ambulatory mental health clinicians (non-admitted). One quarter of the cohort visited the emergency department four or more times.

2.32 In the 24 months after their index offence was finalised, 1211 (75%) cohort members reoffended including convictions for new violence, drug or theft offences. The study defined reoffending as any new court appearances (except breaches of court orders) finalised within 24 months of the index court appearance, regardless of

outcome. Common sentences for these further offences were fines (460) and supervised or unsupervised community-based sentences (363). It took a median of 206 days before reoffending. During the study period, 31% (514) of the cohort were diverted on mental health grounds for an offence.

2.33 Compared with members of the cohort who did not reoffend within 24 months, those who reoffended were more likely to be younger, have been diagnosed with a personality disorder, have a substance use disorder, and have previously received a mental health dismissal. The authors suggested the results pointed to both a relationship between the mental health issue and the offending, and how the mental health issue could affect the offender's ability to follow a treatment plan or engage with other supports. They suggested "special options" were necessary to support homeless offenders to avoid reoffending, as diversionary programs may not be available or accessible to people with mental health or cognitive issues.

2.34 One limitation was that the study could not take into account any convictions pre-dating the index offence, which other studies have suggested could be a predictor of reoffending.

2.35 The study estimated that the cohort's offending cost AUD $11.3 million in court costs; a median $3905 per person. This estimate was based on average court finalisation costs, youth conferencing costs and estimated police caution costs. The estimate did not include the costs of legal services or imprisonment.

2.36 The authors noted the need for a more holistic, comprehensive approach to addressing the causes of offending by people experiencing homelessness. They suggested courts may need "special options" for responding to offenders with mental health issues, given the issues themselves may make compliance with treatment plans or supervision difficult. The authors also emphasised the need for more integration between strategies that address homelessness, health and offending.

An evaluation of the NSW domestic violence electronic monitoring program

2.37 This study published by BOCSAR[5] examined the operation of the NSW domestic violence electronic monitoring (DVEM) program, and estimated the association between DVEM program participation and recidivism.

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5. S Boiteux and A Teperski *An Evaluation of the NSW Domestic Violence Electronic Monitoring Program,* Crime and Justice Bulletin No 255 (NSW Bureau of Crime Statistics and Research, 2023).

2.38 The DVEM program is the first electronic monitoring program in NSW to target domestic violence (DV) offenders and their compliance with Apprehended Domestic Violence Orders (ADVOs). It commenced in June 2016.

2.39 As part of the program, medium to high risk offenders are fitted with an electronic monitoring device, and have their location monitored in relation to exclusion zones imposed by the ADVO, for example the victim's home or other location. If an offender enters an exclusion zone they are contacted and asked to leave, and NSW Police are called if they do not comply.

2.40 To enter the DVEM program, an offender must meet suitability and eligibility criteria including:

- a current intensive correction order (ICO) or parole order for a DV offence
- a history of DV offending
- a medium to high level risk of reoffending
- an active ADVO with a no-contact restriction
- a place restriction involving a measurable distance, and
- the ADVO lists an adult as the primary person in need of protection.

2.41 Eligible victims can also volunteer to carry a paired monitoring device to track the offenders' proximity, and create an additional exclusion zone when the victim is away from home.

2.42 The study compared 226 DVEM participants with 768 people released from prison who were eligible but did not participate in the program. The two cohorts were matched on relevant characteristics.

2.43 The study compared the two groups for outcomes including:

- the probability of any reoffending
- domestic violence reoffending
- ADVO breach, and
- return to custody.

2.44 The evaluation found that participants had lower reoffending rates and lower breaches of ADVOs when compared with eligible non-participants.

2.45 Within 12 months, DVEM participants were less likely to return to custody, and significantly less likely to reoffend.

2.46 When considering baseline reoffending levels, DVEM participants exhibited a decrease (relative to non-matched participants) of:

- 9.6% in any reoffending

- 32.9% in DV reoffending
- 19.4% in ADVO breach reoffending, and
- 11.4% in re-entry into custody.

2.47 The study demonstrates that DVEM participation is associated with significantly reduced likelihood that an offender will reoffend and/or be imprisoned within 12 months of release. It suggests electronic monitoring can effectively manage serious domestic violence offenders in the community without compromising the safety of victims.

Staff insights on the Short Sentence Intensive Program

2.48 This study,[6] conducted by Corrections Research Evaluation and Statistics, evaluated the implementation of the Short Sentence Intensive Program (SSIP), with a focus on participant identification and placement, intervention delivery and local logistics.

2.49 The SSIP is a Corrective Services NSW initiative that delivers behaviour change programs and reintegration services to people serving custodial sentences of less than 5 months. The SSIP commenced in December 2020 and is run at seven sites.

2.50 The study involved 25 semi-structured interviews of key staff at each site, and analysed responses thematically.

2.51 The SSIP is implemented differently between sites, however staff responses raised four consistent themes.

2.52 Staff and physical resources are not dedicated to the SSIP; it operates in conjunction with ordinary offender services and programs. SSIP participants also work in Corrective Services industries. As a result, SSIP engagement was regularly deprioritised or rushed in favour of those activities. Staff reported this was the main factor affecting implementation. Staff reported wages were important for incentivising engagement and also to meet a participant's practical needs, but were only available to some participants.

2.53 The SSIP not only includes those with custodial sentences of less than 5 months, but also those with pending court matters, serving a balance of parole, and those requiring an alternative to their original interventions. This caused constant attrition

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6. B B Y Ross, Y Mahajan and M V A Howard, *Implementation of an Initiative for People with Less than Five Months to Serve in Prison: Staff Insights on the Short Sentence Intensive Program (SSIP)*, Research Publication No 66, Corrections Research Evaluation and Statistics (2023).

and turnover of participants, which reduced therapeutic effectiveness, and increased the administration load for staff.

2.54 SSIP services were often delivered in intensive format to meet the time constraints of the cohort. The study suggested that having rolling participant groups was less effective than delivering services to a fixed participant cohort. Additionally, staff reported that at times, the frequency of intervention exceeded a participant's ability to process information.

2.55 The study demonstrated that several factors were paramount for therapeutic effectiveness:

- intrinsic motivation of participants
- buy-in from staff
- staff training, and
- streamlined processes to retain focus on the person.

2.56 Staff generally welcomed the SSIP as a worthwhile but challenging intervention for this cohort. The study demonstrated many issues in delivering intervention and services to individuals serving custodial sentences of less than 5 months. The study suggested avenues for improvement to increase therapeutic and operational effectiveness, particularly that there be dedicated resources and participants allocated to the SSIP.

Influence of a residential drug and alcohol program on young people's criminal conviction trajectories

2.57 This study, published in the *Journal of Criminal Justice,* examined the impact of a residential drug and alcohol community treatment program on the number of subsequent convictions among young people who engaged in the treatment.[7]

2.58 The study used data from the Program for Adolescent Life Management (PALM), a therapeutic community program in Sydney and Canberra for young people aged 13 to 18 years with problematic alcohol and/or drug (AOD) use. This involves young people being placed in residential settings to engage in group activities, individual counselling, and receive general support to develop healthy lifestyles. Young people are often referred to such programs by family, courts, mental health services and doctors. Past research has found that therapeutic community programs, which aim to treat problematic AOD use, may reduce repeat offending among such young people.

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7. T Whitten and others, "Influence of a Residential Drug and Alcohol Program on Young People's Criminal Conviction Trajectories" (2023) 84 *Journal of Criminal Justice* 1.

2.59 The authors highlighted that young people who commit crime and use and depend on AOD are more likely to have repeated involvement with the criminal justice system. Such young people often experience cyclical disadvantage, and their involvement in the criminal justice system further exacerbates this disadvantage.

2.60 The study used extensive administrative data from 891 17-year-olds in the Sydney program, who also had at least 5 years of data following the treatment. They specifically chose 17-year-olds because it was the average age of young people in the program.

2.61 The study also identified young people's offending trajectories before they engaged in the program. Offending trajectories refer to developmental patterns of behaviour which describe the link between offending and age. For example, the authors argued that offending at a very young age was associated with structural disadvantage and psychosocial adversity. Because young people rarely, or are less likely to escape from such adversity, their risk of reoffending is substantially increased.

2.62 The study used a group-based trajectory model to assess the impact of PALM and prior offending trajectories. The authors set out three different trajectory groups for all study participants:

- The "no or low conviction trajectory" group were first convicted, on average, at the age of 18.47 years. They were also convicted 0.15 times on average between 10 and 16.
- The "moderate incline conviction trajectory" group were first convicted, on average, at the age of 15.17 years and had 3.34 convictions on average between 10 and 16.
- The "high incline conviction trajectory" group were first convicted, on average, at the age of 13.52 years and had 10.29 convictions on average between 10 and 16.

2.63 The study separated the sample into:

- a control group – young people who were referred to PALM but did not attend or left before 31 days of treatment, and
- a treatment group – young people who engaged in the program for more than 30 continuous days.

2.64 By comparing the number of subsequent convictions between the control group and the treatment group, the study found the "high incline conviction trajectory" group had significantly fewer convictions than the control group. In contrast, they found only slight differences between the other two trajectory groups and the control group.

2.66 The authors identified the following limitations to the study:

- The conviction trajectories of the groups were estimates and approximations. Group-based trajectory modelling depends on the quality of data and model fit.
- The study did not examine the effect of PALM treatment for young people under 17.
- The study could not control for potential compounding factors such as child abuse or neglect and out-of-home care.
- Although the authors discussed the overrepresentation of Indigenous young people in PALM, they did not undertake an analysis of their specific trajectories and experiences.

2.67 The study concluded that residential therapeutic programs can be an effective alternative to criminal and legal responses in reducing repeat offending among young people who engage in problematic AOD use, commit crime at a very early age, and have a high number of convictions.

Characteristics of people in prison who have experienced parental imprisonment

2.68 This study by the Australian Insitute of Criminology[8] identified some common characteristics associated with people in prison who have at least one parent who has been incarcerated.

2.69 The study was derived from data collected in two state-wide surveys of the populations of NSW prisons and youth justice centres in 2015:

- the NSW Network Patient Health Survey which undertook a cross section of 1132 adults in correction, and
- the Youth People in Custody Health Survey which was a cross section survey of 212 young people in youth justice centres in NSW.

Not all people in custody in NSW were involved in the studies.

2.70 Some characteristics were more prevelant in participants who had experienced a parent in prison. These include:

- being of a young age at the time of their first incarceration
- having previous experience in youth detention
- having previous experience in out-of-home-care

8. M Remond and others, *Intergenerational Incarceration in New South Wales: Characteristics of People in Prison Experiencing Parental Imprisonment*, Trends and Issues in Crime and Criminal Justice No 663 (Australian Institute of Criminology, 2023).

- having completed less years of schooling, and
- Aboriginal status.

2.71 The study found that 16.9% of adults incarcerated in NSW in 2015 had experienced one or both parents being incarcerated. Although there was no control data for the percentage of the general population who had experienced parental incarceration, the study suggested that the ratio of people who have experienced parental incarceration is much higher in the prison population than in the general population.

2.72 Several characteristics were associated with prisoners who had experienced having a parent in prison:

- Participants were more likely to report that that their fathers had been to prison than their mothers. This reflects the gender disparity in incarceration in Australia which sits at a ratio of men to women of 12 to 1. However, adults reported that their fathers had gone to prison at a ratio of 4 to 1 with mothers, while young people reported a ratio of a 3 to 1. This suggests that a mother's incarceration has a stronger influence than a father's.
- Almost 32% of adult Aboriginal participants had experienced parental incarceration, 2.5 times higher than the rate of non-Aboriginal adults (12.2%). This disparity was also reflected in young participants; Aboriginal young people were almost twice as likley as non-Aboriginal young people to have experienced parental incarceration (66.4% against 35.1%). The high rates of parental incarceration for Aboriginal people showed the far reaching effects of over-representation of Aboriginal people in the justice system which currently sits at 10 times the national rate.
- Parental incarceration was reported in 16.9% of adults in prison, compared with 52.6% of young people in youth justice centres. Younger adult participants were also more likely to report parental incarceration compared with older adult participants. This suggested that parental incarceration was significantly more likely to influence incarceration of younger people.
- People in prison who had experienced parental imprisonment tended to have completed fewer years of schooling. Of those in prison who had completed year 10, 11% had had a parent in prison while of those who had not completed year 10, 26.5% had had a parent in prison.
- Adults in prison who had previously been held in youth detention were more than twice as likely to report parental incarceration compared with those who had not experienced youth detention (27.0% as opposed to 12.1%).

- Adults convicted of violent crimes against others were more likley to have experienced parental incarceration compared with those who had been convicted of non-violent crimes. An outlier to this statistic was adults convicted of sexual offences.
- Participants who had experienced out-of-home care were twice as likely to report parental incarceration as those who had not (30.2% as opposed to 14.7%).

2.73 The study had four main limitations:

- There were no control groups of non-incarcerated people who experienced parental imprisonment, making it difficult to determine the extent to which parental incarceration increased the likelihood of time in prison.
- There were only a small number of participants in both studies, particularly in the youth study (which also had few young women, meaning that generalisations derived from the study may be inaccurate).
- The study did not use primary data so no confidence intervals for variables could be calculated.
- The study was restricted by the variables selected by primary researchers. Other variables such as peer group influence or environmental factors were therefore not included.

2.74 The study concluded that an holistic intervention is needed to address patterns of intergenerational incarceration. This should focus on at-risk children and be tailored to community and individual needs, particularly those of Aboriginal and Torres Strait Islander communities. Addressing the relationship between variables highlighted in the study would reduce social disadvantage associated with the cycle of intergenerational incarceration. The fact that the imprisonment of mothers appears to have a stronger link to social disadvantage leading to intergenerational incarceration than the imprisonment of fathers, should also inform intervention approaches.

2.75 Further, the fact that young age and previous experiences of youth detention were associated with parental imprisonment demonstrated the relationship between young people in detention and previous parental imprisonment. The authors said that these findings "strongly suggest that increasing the age of criminal responsibility is a crucial step in breaking the cycle of intergenerational incarceration".[9]

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9. M Remond and others, *Intergenerational Incarceration in New South Wales: Characteristics of People in Prison Experiencing Parental Imprisonment*, Trends and Issues in Crime and Criminal Justice No 663 (Australian Institute of Criminology, 2023) 17.

The costs associated with decriminalising drug use in NSW

2.76 This report[10] published in the *Journal of Substance Use and Addiction Treatment* analysed existing policy relating to drug possession charges by examining four options for people using or in possession of a prohibited drug.

2.77 The background to the report was that although most Australian states and territories have established some form of scheme to divert minor drug offenders from court, the number of individuals charged with drug possession continues to rise.

2.78 The report explored the costs associated with:

- maintaining the current policy
- expanding the existing cannabis cautioning scheme to all drug use/possession offences
- issuing an infringement notice to those found in possession of a prohibited drug with no limit on the number of infringements a person can receive, and
- prosecuting all drug use/possession offences in court.

2.79 The current policy is that under the *Drug Misuse and Trafficking Act*,[11] there is a maximum penalty for possession of a prohibited drug of a $2200 fine and/or 2 years' imprisonment. Under the cannabis cautioning scheme, a person found in possession of cannabis can receive a police caution, if they have received no more than one previous caution and are in possession of 15g or less of cannabis and have no prior criminal record involving drugs, violence or sexual assault. Police also have discretion to issue a penalty notice in where the person is in possession of:

- a small quantity of MDMA/ecstasy which does not exceed a small quantity and is in capsule form
- MDMA/ecstasy in some other form that is less than a trafficable quantity, and
- a prohibited drug that is not MDMA/ecstasy and does not exceed a small quantity.[12]

2.80 The study used a microsimulation model calibrated to the NSW criminal justice system and examined costs saved, based on the four options.

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10. A D Tran, D Weatherburn and S Poynton, "The Savings Associated with Decriminalization of Drug Use in New South Wales, Australia: A Comparison of Four Drug Policies" (2023) 149 *Journal of Substance Use and Addiction Treatment* 1.
11. Drug Misuse and Trafficking Act 1985 (NSW).
12. Criminal Procedure Act 1986 (NSW) s 333.

2.81 The study concluded that the estimated annual costs were as follows:

- maintaining the current policy: $977 per offence
- expanding the existing cannabis cautioning scheme to all drug use/possession offices: $507 per offence
- issuing infringement notices with no limit on the number of infringements a person can receive: a net revenue gain of $225 per offence, and
- prosecuting all drug use/possession: $1282 per offence.

2.82 The study concluded that extending the cannabis cautioning scheme to all drugs would reduce the cost of current policy by more than 50%. A policy of issuing infringement notices or cautions for drug use/possession would save costs and generate income for the government.

2.83 The report rested on several key assumptions. It assumed that the method of proceeding against drug use/possession offenders has no effect on the prevalence or incidence of prohibited drug use. It also assumed that all those fined pay the fine imposed on them by the courts or infringement notice. The effect of this on costing estimates depends on whether the non-payment rate is lower for court-imposed fines than for infringement notices and the size of any difference in non-payment between these two methods. The report used average length of stay in prison and average length of supervised order to calculate the costs. The key assumption is that a change in the volume of cases proceeding to court would not affect the rate at which people were convicted or sentenced, or the seriousness of their offending. The assumption is that this rate would remain the same, even if the number of cases increased.

2.84 The study's findings suggested that monetary savings should be considered in deciding on policy changes. The report acknowledged that drug offenders made up the bulk of those appearing in court, but a large part of the drug law enforcement budget appeared to be directed at apprehending those involved in the importation, cultivation, manufacture, and trafficking of drugs. It also recommended considering whether fines or infringement notices for drug use or small quantity possession are worth the benefit gained in terms of public safety.

3. Cases of interest

3.1 This chapter summarises sentencing cases of interest arising in the High Court of Australia, NSW Court of Criminal Appeal and NSW Supreme Court in 2023. Of particular interest are the cases on the ongoing question of the process for imposing intensive correction orders (ICOs), cases relating to considerations arising from the *Bugmy* case, and cases on the use of good character in sentencing.

Purposes of sentencing

Recognising harm to the community

3.2 One of the purposes of sentencing under s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSPA) is "to recognise the harm done to the victim of the crime and the community".[1] Two cases considered harm to the community.

Impact of armed robbery on small country town

Harris v R [2023] NSWCCA 174

3.3 The offender was found guilty by a jury of one count of armed robbery with an offensive weapon,[2] committed at a small RSL Club with staff and patrons present. He was sentenced to 9 years 6 months' imprisonment with a non-parole period of 5 years 9 months.

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1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g).
2. *Crimes Act 1900* (NSW) s 97(1).

3.4 The only ground of appeal was that the sentence imposed was manifestly excessive. One sub-ground was that harm to the community was not a relevant matter to be taken into account in sentencing the offender.

3.5 The NSW Court of Criminal Appeal (CCA) rejected this ground. The court found that the sentencing judge did not improperly elevate the harm to the community caused by the offending. The fact the offence took place on a Sunday afternoon in a club in small country town was relevant to considering the harm to the community. This was particularly the case as the offender used his knowledge of the community when making threats, and because the club was an important source of local income, which meant the offence had a greater impact than it would have had in a larger area with more job opportunities.

3.6 The court rejected the other grounds and dismissed the appeal.

Impact of caring for victim's surviving children

R v Dempsey [2023] NSWSC 205

3.7 The offender pleaded guilty to murder[3] and was sentenced to 19 years 9 months' imprisonment with a non-parole period of 14 years 6 months.

3.8 The offender killed his former partner and mother of his children in her home. The victim's sister and half-sister cared for the victim's children following the murder and gave victim impact statements (VISs) detailing the effect on their wider family.

3.9 The victim's sister had four young children of her own and cared for the surviving children for several years. She received little or no support from the Department of Family and Community Services. She spoke of her grief and loss and that of the children. After several years she relinquished care of the children to the victim's half-sister.

3.10 In her VIS, the victim's half-sister explained that the children effectively lost both their parents due to the murder. She detailed the challenges of attempting to integrate two traumatised, high needs children into her young family.

3.11 In sentencing, the Court considered the impact on families acting as care givers of surviving children as an aspect of harm done to the community.[4] The Court considered that the murder impacted not only the victim's children, but also the extended family, particularly as they provided care and consolation to the victim's children in distressing circumstances.

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3. *Crimes Act 1900* (NSW) s 18.
4. *Crimes* (*Sentencing Procedure) Act 1999* s 3A(g).

General deterrence

3.12 One of the purposes of sentencing under s 3A of the CSPA is "to prevent crime by deterring … other persons from committing similar offences".[5] This is otherwise known as "general deterrence".

Where offence arose in dealing with a prohibited firearm

***R v Zarshoy* [2023] NSWSC 1177**

3.13 The offender was convicted of manslaughter having shot the victim in the leg during the attempted purchase of an unregistered and prohibited firearm. The victim later died of that injury.

3.14 The Supreme Court considered, even though the offence was manslaughter, the fact that the offence arose out of the planned purchase of a prohibited firearm ultimately used to kill the victim was relevant to general deterrence. The Court explained:

> [i]n such circumstances, general deterrence is of some significance in the sentencing process. The importance of the type of firearm and weapon laws in place in Australia cannot be overstated. Offences that involve prohibited firearms, especially those resulting in death, must be severely punished as a disincentive to those who would use such firearms.[6]

3.15 The offender was sentenced to 12 years' imprisonment with a non-parole period of 8 years.

Particular offences and types of offenders

Vehicular manslaughter

***Chandler v R* [2023] NSWCCA 59**

3.16 The offender, trying to escape police, deliberately drove a stolen car through a fence into a suburban backyard, killing a child. He pleaded guilty to manslaughter and was sentenced to 19 years' imprisonment with a non-parole period of 13 years.

3.17 One ground of appeal was that the offender's sentence was manifestly excessive.

3.18 The majority of the CCA allowed this ground. The Court found that four factors, taken together, led to the conclusion that the sentence was manifestly excessive:

- The sentence was the second highest recorded for one count of manslaughter, except for one case found to be in the "worst category".

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5. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(b).
6. *R v Zarshoy* [2023] NSWSC 1177 [83].

- The sentence was longer than any other sentence for vehicular manslaughter with one death, and any indicative sentence for vehicular manslaughter with multiple deaths. The sentence was also the second highest accounting for aggregate sentences for multiple deaths.
- The sentence was comparable to sentences for murder where a motor vehicle was used as a weapon.
- The offender's reduced moral culpability due to *Bugmy* factors[7] did not appear to be reflected in the starting point of 20 years' imprisonment. The starting point did not appear to reflect the causal link the sentencing judge found between the offender's deprived background and his offending.

3.19 In dissent, Justice Beech-Jones considered the sentence was not manifestly excessive as the circumstances of offending were worse than comparable vehicular manslaughter cases, and the offender knew there was an appreciable risk of serious injury to others.

3.20 The Court rejected all other grounds and allowed the appeal, resentencing the offender to 15 years 8 months' imprisonment with a non-parole period of 10 years 6 months.

Supply of firearms

Andreou v R [2023] NSWCCA 295

3.21 The offender pleaded guilty to offences including supplying a pump action shotgun,[8] two counts of possessing prohibited weapons (gel blasters),[9] and three weapons-related summary offences.[10] He was sentenced to an aggregate sentence of 5 years' imprisonment with a non-parole period of 3 years.

3.22 The sole ground of appeal was that the sentencing judge erred by handing down a manifestly excessive sentence, and that the three related summary offences were taken into account in the custodial sentence when they should not have been, as they were relatively minor.

3.23 The CCA found that there was no ground for complaint about the sentence. The Court noted, in respect to the offence of supplying a pump action shotgun, that the very high maximum penalty for offences concerning prohibited firearms showed the concern with which parliament viewed the circulation of lethal weapons outside of the licensing and registration regime. The CCA noted that offences with heavily deterrent maximum sentences and standard non-parole periods (SNPPs) are

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7. *Bugmy v R* [2013] HCA 37, 249 CLR 571.
8. *Firearms Act 1996* (NSW) s 51(2A).
9. *Firearms Act 1996* (NSW) s 7(1).
10. *Explosives Act 2003* (NSW) s 6(1); *Weapons Prohibition Act 1998* (NSW) s 7(1).

intended to prevent prohibited firearms falling into the hands of criminals, who would use them to further other criminal activities, including drug distribution and robbery. It therefore attracted a sentence that would involve significant general deterrence.

3.24 The Court dismissed the appeal.

Domestic violence offences: use of conviction only penalty

R v Sharrouf [2023] NSWCCA 137

3.25 The offender was found guilty of multiple serious domestic violence-related offences.[11] The offender received an aggregate sentence of 10 years' imprisonment with a non-parole period of 5 years.

3.26 One of the prosecution's appeal grounds was that the sentencing judge should not have imposed a conviction with no further penalty ("conviction only")[12] for some of the offences. The CCA unanimously allowed this ground.

3.27 In re-sentencing the offender, the Court considered that while sentencing law does not prohibit the use of a conviction only for domestic violence offences, it must be used rarely. The Court remarked further that there is less scope for courts to use a conviction only for serious offences that require general deterrence, denunciation and community protection.[13] This conclusion was further supported by the existence of provisions aimed at the protection and safety of victims and requiring full-time detention or supervision for domestic violence offenders in some cases.[14]

3.28 The Court resentenced the offender to 14 years' imprisonment with a non-parole period of 9 years.

Contract debt enforcers

Wade v R [2023] NSWCCA 135

3.29 The offender pleaded guilty to entering a house with intent to commit a serious indictable offence while armed with an offensive weapon, and kidnapping with intent to commit a serious indictable offence in company, causing actual bodily harm.[15] The offender was acting on behalf of a man who claimed the victim owed him $1,000,000. The offender was sentenced to 6 years' imprisonment with a non-parole period of 3 years 7 months.

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11. *Crimes Act 1900* (NSW) s 61I, s 61J(1), s 61L, s 37(2), s 33B(1)(a), s 59(1), s 61.
12. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10A.
13. *R v Sharrouf* [2023] NSWCCA 137 [188].
14. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 4A, s 4B.
15. *Crimes Act 1900* (NSW) s 111(3), s 86(3).

3.30 The Court described the offender and the co-offender as "contract enforcers", there to enforce a debt that was not owing to them personally.[16]

3.31 One appeal ground was that the sentence imposed was manifestly excessive.

3.32 The CCA dismissed the appeal, finding that contract enforcers "should be viewed with considerable disapproval by the courts" and this should be measured by the sentence imposed.[17]

Constructive murder

R v Hamdach [2023] NSWSC 298

3.33 The offender pleaded guilty to murder. The murder occurred following a transaction gone wrong. The offender purchased counterfeit goods from the victim, which the victim purported to be genuine branded products. The offender organised with an accomplice to confront the victim, demand a refund and to "teach him a lesson". The offender's accomplice delivered an ongoing and violent assault resulting in the victim's death.

3.34 The offender's criminal responsibility was for constructive murder.[18] Constructive murder requires an offender's act to cause death during or immediately after they or their accomplice committed a crime punishable by life or 25 years' imprisonment. In this case, the foundational offence was aggravated kidnapping.[19]

3.35 While the category of murder was not deemed essential to an assessment of the objective seriousness of an offence, the Court noted that the offender did not intend to kill or inflict grievous bodily harm on the victim or even foresee that his accomplice would intend to kill or inflict grievous bodily harm. The Court determined that the absence of such intent or foresight reduced the objective seriousness of the offence, in comparison with other instances of murder.

3.36 The offender was sentenced to 16 years' imprisonment with a non-parole period of 11 years 10 months.

Revenue fraud

Lin v R [2023] NSWCCA 304

3.37 The offender pleaded guilty to the Commonwealth offence of possessing tobacco products with intent to defraud the revenue,[20] and was sentenced to 2 years'

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16. *Wade v R* [2023] NSWCCA 135 [59].
17. *Wade v R* [2023] NSWCCA 135 [59].
18. *Crimes Act 1900* (NSW) s 18.
19. *Crimes Act 1900* (NSW) s 86(3).
20. *Customs Act 1901* (Cth) s 233BABAD(2); *Criminal Code* (Cth) s 11.2A(1).

imprisonment with a direction that they be released after 1 year on a recognisance release order in the sum of $1000 without surety.

3.38 In deciding a parity appeal (in which the offender was unsuccessful), the Court considered the purpose and utility of sentencing as it applies to revenue law. In particular, the Court noted that specific and general deterrence were critical to address the practical restriction on the capacity of law enforcement agencies to apprehend every offender for such offences. It was therefore said that courts should seek to ensure appropriate punishment, emphasising specific and general deterrence.

3.39 The Court noted that, with modern technology, "fraud may be more easily detected, but, fundamentally, the revenue provisions depend upon the honesty and transparency of people, in this case, importing or seeking to import goods and informing customs of such a circumstance".[21]

3.40 The Court also emphasised the relevance of the high penalties to the policy objectives of government, noting that the duties were intended to discourage the consumption of tobacco, particularly by young people.

Matters taken into account

Bugmy considerations

3.41 The High Court's decision in *Bugmy* established that the effects of profound deprivation on individual offenders, including Indigenous offenders, may mitigate a sentence because their moral culpability is likely to be less than that of an offender whose formative years have not been marred in that way. The Court accepted these effects do not diminish over time, and should be given full weight in sentencing.[22]

3.42 *Bugmy* considerations arise often in sentencing. The following two cases specifically deal with the application of the principles.

Use of the *Bugmy Bar Book*

Baines v R [2023] NSWCCA 302

3.43 The offender was found guilty of one charge of murder[23] arising from a drive by shooting and was sentenced to a term of imprisonment of 36 years with a non-parole period of 27 years.

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21. *Lin v R* [2023] NSWCCA 304 [42].
22. *Bugmy v R* [2013] HCA 37, 249 CLR 571.
23. *Crimes Act 1900* (NSW) 18(1)(a).

3.44 One ground was that the sentencing judge erred by not taking into account the offender's background of disadvantage as a reason to reduce his moral culpability in accordance with *Bugmy*.

3.45 Another ground was that the judge declined to take into account the fact that the offender had tendered the *Bugmy Bar Book*. This is a publication prepared by the NSW Public Defenders that collects resource material which explains the impact of social disadvantage.

3.46 On the first ground, the Court found that the offender had established a causal link between the offender's deprived background and the commission of the offence, and the judge had erred in failing to find that moral culpability was reduced because of the history of deprivation. These principles apply to even the most serious offences.

3.47 On the second ground, the Court found that it was the judge's task to take into account the specific personal circumstances of the offender. The *Bugmy Bar Book* may qualify as expert non-opinion evidence, which can assist a sentencing judge to understand specific evidence about the circumstances of a particular offender. However, it was not established that the sentencing judge's treatment of the *Bugmy Bar Book* in this case materially affected the sentencing decision. This ground was, therefore, not accepted.

3.48 The Court resentenced the offender to 30 years' imprisonment, with a non-parole period of 22 years 6 months.

Relevance of other considerations

R v MJ [2023] NSWCCA 306

3.49 The offender pleaded guilty to one count of sexual intercourse with a child between the ages of 10 and 16,[24] and was sentenced to 3 years 4 months' imprisonment with a non-parole period of 1 year 10 months.

3.50 The prosecution's sole ground of appeal was that the sentence was manifestly inadequate.

3.51 The CCA found that while the sentencing judge could reasonably decide that, in accordance with *Bugmy* principles, the offender's "early social and economic deprivations" reduced the respondent's moral responsibility and reduced the weight of general deterrence, this did not mean that the judge could overlook specific deterrence, community protection or denunciation or give no weight to

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24. *Crimes Act 1900* (NSW) s 66C(1).

general deterrence.[25] All of these were relevant to cases of sexual assault upon young children.

3.52 The Court allowed the appeal and resentenced the offender to 6 years' imprisonment with a non-parole period of 4 years.

Mental health or cognitive impairment in sentencing for manslaughter by substantial impairment

Camilleri v R [2023] NSWCCA 106

3.53 The offender was found guilty by a jury of manslaughter based on substantial impairment.[26] She was sentenced to 21 years 7 months' imprisonment with a non-parole period of 16 years 2 months.

3.54 The offender killed her mother by stabbing, mutilating and decapitating her in the home they shared, in the presence of a child. The offender had an extensive history of mental health issues and cognitive impairment.

3.55 One ground of appeal was that the sentencing judge erred in assessing the "gravity of the crime". The offender argued that the judge failed to consider the extent to which her mental and cognitive impairment affected the objective seriousness of the offending and her moral culpability. The offender also argued the sentencing judge downplayed the significance of the spontaneity of the attack because it was sustained.

3.56 The majority of the CCA allowed this ground.

3.57 The Court found that an offender's mental health or cognitive impairment is relevant in assessing objective seriousness and moral culpability, which are separate but related concepts, when sentencing for an offence of manslaughter based on substantial impairment. The majority found that the principle against "double counting" does not prevent an offender's mental or cognitive impairment being relevant to assessing the objective seriousness of the offending, although it led to a conviction for manslaughter rather than murder.

3.58 The Court also found the sentencing judge erred in considering the effect of the spontaneity of the attack on objective seriousness, as the offender lost control for the duration of the attack.

3.59 The Court rejected all other grounds of appeal and resentenced the offender to 16 years 6 months' imprisonment with a non-parole period of 12 years.

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25. *R v MJ* [2023] NSWCCA 306 [81].
26. *Crimes Act 1900* (NSW) s 23A.

Delay

***Richards v R* [2023] NSWCCA 107**

3.60 The offender, a teacher, pleaded guilty to six counts of indecent assault and one count of sexual assault with an act of indecency against a person under 16, over a period from 1969 to 1985. The offences were committed against three students. The offender was sentenced to 8 years' imprisonment, with a non-parole period of 5 years.

3.61 One ground of appeal was that the sentencing judge failed to properly account for the delay in the offender being charged with the offences, where his imprisonment had been extended three times as he was charged with and convicted of new offences. The offender had been charged with new offences occurring in the same period as the other offences for which he was already in prison, and was not released on parole as a result of the new sentence. The Court found the sentencing judge had taken this into account. The Court observed that the offender's sentence should not be discounted simply because victims had made complaints at different times. It is "not uncommon" for victims to delay reporting child sex offences and only delay caused by the legal process is relevant to sentencing, not delay caused by the offender remaining silent about their crimes.

3.62 The Court rejected all other grounds and dismissed the appeal.

Victim consenting to other sexual activity

***Kramer v R* [2023] NSWCCA 152**

3.63 The offender was found guilty of one count of sexual intercourse without consent[27] against a victim he met on a dating application. He was sentenced to a community correction order for a period of two years.

3.64 One of the prosecution's grounds of appeal was that the sentencing judge erred in assessing the objective seriousness of the offence. In upholding this ground of appeal, the CCA found that consenting to some sexual activity before or after sexual intercourse without consent does not reduce the seriousness of the offending.[28] The victim had clearly communicated that she did not consent to the sexual intercourse.

3.65 The Court also found the sentence to be manifestly inadequate, but exercised its discretion not to interfere with the sentence because the offender had completed the community work component of the CCO and could show progress in rehabilitation that would be adversely affected by full-time imprisonment.

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27. *Crimes Act 1900* (NSW) s 61I.
28. *Kramer v R* [2023] NSWCCA 152 [185]–[186].

Failure to provide essential medical care in custody

R v RE [2023] NSWCCA 184

3.66 The offender, a photographer, was found guilty by a jury of two counts of sexual intercourse without consent and one count of indecent assault in relation to two young models six years apart.[29] He was sentenced to an aggregate sentence of 2 years 8 months' imprisonment with a non-parole period of 1 year 1 month for the sexual intercourse offences, and a community corrections order of 3 years for the indecent assault.

3.67 Some of the prosecution's grounds of appeal included the manifest inadequacy of the aggregate sentence of imprisonment for the sexual intercourse offences, and the manifest inadequacy of the community corrections order for the indecent assault.

3.68 The CCA rejected the manifest inadequacy grounds. Although the sentences imposed were lenient, and the non-parole period of 40% of the head sentence was generous, this was on account of special circumstance relating to the subjective case. Among other issues the Court considered the fact that the offender had been diagnosed with throat cancer and gastric lymphoma. The Court noted that there was evidence that the offender's medical care had "been neglected" while he was incarcerated. The offender had received initial treatment before he was remanded in custody, but he was due to undertake follow-up testing and required ongoing pain relief, which Justice Health had failed to arrange.

3.69 The Court observed that, had it taken a different view of the sentence's adequacy, it would have "inevitably" exercised its discretion not to increase the sentence in view of the further delay in providing "essential and urgent medical attention".[30]

3.70 The Court dismissed the appeal.

Discount for facilitating the administration of justice

Dukagjini v R [2023] NSWCCA 210

3.71 The offender was found guilty, after a judge-alone trial, of murder following a break and enter gone wrong. He was sentenced to 20 years' imprisonment with a non-parole period of 13 years.

3.72 The parties agreed to a judge-alone trial due to the risk that a jury might misconstrue the significance of DNA evidence and might misuse tendency evidence as evidence of bad character. The trial was estimated to take three weeks, but it

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29. *Crimes Act 1900* (NSW) s 61I, s 61L (repealed).
30. *R v RE* [2023] NSWCCA 184 [53].

finished within 7 days. No civilian witnesses were called, and a significant portion of evidence was tendered in documentary form.

3.73 The offender's sole ground of appeal was that the judge took into account an irrelevant consideration when determining whether to apply the provision that allows a judge to impose a lesser penalty having regard to the degree to which the defence has facilitated the administration of justice.[31]

3.74 The CCA rejected this ground and dismissed the appeal.

3.75 The Court found that judge-alone trials do not automatically result in efficiencies or savings that facilitate the administration of justice and entitle an offender to a reduced sentence. The Court found that the sentencing judge commented on the way the trial proceeded before him and considered that the administration of justice was not facilitated by the mode of the trial. The judge was entitled to reach that view as a matter of discretion.

Actual or threatened use of a weapon

Flick v R [2023] NSWCCA 197

3.76 The offender pleaded guilty to six aggravated break and enter offences, entering with intent to steal, and six larceny offences that were taken into account on a Form 1.[32] He committed two further offences while on remand and was sentenced for these at the same time.[33] The offender received an aggregate sentence of 9 years' imprisonment, with a non-parole period of 5 years.

3.77 One ground of appeal was that the sentencing judge erroneously took into account statutory aggravating factors. One of these factors was actual or threatened use of a weapon.[34] Footage showed the offender had a knife strapped to his arm in one of the break-ins, while in another he had a knife in his hand. The sentencing judge accepted that this was evidence of threatened use of a weapon.

3.78 The Court observed that use or threatened use of a weapon requires more than mere possession. As the offender did not encounter anyone during the break-ins, there was no evidence that he brandished the knife at anyone or verbally threatened to use it.

3.79 The Court allowed the appeal on this ground and resentenced the offender to an aggregate sentence of 8 years 9 months' imprisonment, with a non-parole period of 4 years 10 months.

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31. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22A.
32. *Crimes Act 1900* (NSW) s 112(2), s 154F, s 114(1)(d).
33. *Crimes Act 1900* (NSW) s 60A(1), s 195(1)(b).
34. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(c).

Parity where offenders' maximum penalties differ

***Emanuele v R* [2023] NSWCCA 316**

3.80 The offender pleaded guilty to one offence of knowingly taking part in the supply of a commercial quantity of cocaine,[35] and was sentenced to 5 years' imprisonment with a non-parole period of 3 years.

3.81 One ground of the appeal was that the sentencing judge overlooked the significance of the different offences committed by the offender and the co-offender including the different maximum penalties that applied to those offences.

3.82 The co-offender had been convicted of a more serious offence with a significantly higher maximum penalty. Although the sentencing judge referred to the issue of parity, she considered that the roles played by the offenders were equal and their objective and subjective circumstances were similar, which led to an imposition of similar sentences.

3.83 The CCA, in allowing this ground, observed that while maximum sentences were not determinative, they were an important factor to be considered, and the sentencing judge had given no regard to the maximum sentences. The offender had a justifiable sense of grievance arising from the imposition of an identical sentence to his co-offender, despite being convicted of a less serious offence.

3.84 The Court allowed the appeal and resentenced the offender to 4 years' imprisonment with a non-parole period of 2 years 4 months.

Extra-curial punishment

***Melville v R* [2023] NSWCCA 284**

3.85 The offender pleaded guilty to two counts of sexual intercourse[36] against two step daughters in 1983-1988. Four other counts were taken into account on a Form 1. He was sentenced in the District Court to 3 years' imprisonment, with a non-parole period of 2 years.

3.86 One ground of appeal was that the court erred in finding that the offender had not been subject to extra-curial punishment.

3.87 The CCA clarified what would and would not constitute extra-curial punishment. Extra-curial punishment was described as "some serious loss or detriment" suffered by an offender as punishment for committing the offence/s, other than the punishment imposed by the courts.[37] Public condemnation, humiliation or

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35. *Drug Misuse and Trafficking Act 1985* (NSW) s 25(2).
36. *Crimes Act 1900* (NSW) s 73 and s 61D(1).
37. *Melville v R* [2023] NSWCCA 284 [80].

denunciation that follows from conviction is not inherently extra-curial punishment.[38]

3.88 In this case, a friend and business associate of the offender provided an affidavit describing "a campaign of attacks" against the offender, which had prevented the offender from reestablishing himself in society. The affidavit referred to emails and social media messages, largely directed at informing others of the offender's criminal history. The affidavit suggested these prevented the offender from "establishing himself" after release, but this was contradicted by the fact that the offender had established a family and business.

3.89 The District Court held that this conduct did not enliven considerations of extra curial punishment, and in any event, it had ceased in 2013–2014 apart from a newspaper article from 2020. The Court described the newspaper article from 2020 as legitimate and factual reporting, and although it was distributed to households near the offender's residence, agreed that it did not constitute extra-curial punishment. The Court observed:

> It is not unusual for sexual offending, and particularly sexual offending against young people, to be reported and sometimes reported widely in the media. That phenomenon is even more pronounced with the advent of social media. Even widespread reporting or information dissemination cannot of itself be regarded axiomatically as extra-curial punishment. … That a sex offender will be named as such in press reports is an ordinary consequence of the commission of crime in an age of electronic media. It does not, without more, constitute extra-curial punishment.[39]

3.90 The CCA concluded there was no error in deciding there was no extra-curial punishment. In reaching that conclusion, the Court considered that there was a lack of evidence "of the sort of public opprobrium and 'pillorying' in the media that might enliven considerations of extra-curial punishment".[40]

3.91 The offender also contended that he was prevented from establishing a charitable enterprise overseas due to his arrest, and that this disruption constituted additional and significant extra-curial punishment. The Court disagreed, describing that as an ordinary consequence of committing a crime.[41]

3.92 The Court dismissed the appeal.

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38. *Melville v R* [2023] NSWCCA 284 [80], [82].
39. *Melville v R* [2023] NSWCCA 284 [87].
40. *Melville v R* [2023] NSWCCA 284 [83].
41. *Melville v R* [2023] NSWCCA 284 [85].

Offending motivated by hatred based on sexuality

R v Early (No 8) [2023] NSWSC 1222

3.93 The offender was found guilty of murder,[42] after a trial before a jury, and sentenced to 22 years' imprisonment, with a non-parole period of 15 years 6 months.

3.94 The offender had a history of assaulting men that he believed were homosexual in a particular location.

3.95 The offender either directly assaulted, or encouraged others with him to assault the deceased, with the intention of causing the deceased serious harm. The offender did this because he believed the deceased was homosexual.

3.96 In considering the purposes of sentencing, the Court gave weighty consideration to general deterrence, denunciation and punishment given the serious nature of the offence.[43] The Court stated that the sentence imposed must reflect the "abhorrence with which the Court views violent acts motivated by an offender's hatred and prejudice against another individual for no other reason than that person's sexuality or perceived sexuality", and reiterated "there is no place for such hatred and prejudice in a civilised society".[44]

Good character

3.97 The following cases deal with aspects of the law relating to the use of good character as a mitigating factor in sentencing. On 11 April 2024, we received terms of reference to review the law relating to the use of good character in sentencing. Details of this project will be included in next year's annual report.

Use of good character in sentencing for child sexual intercourse

Bhatia v R [2023] NSWCCA 12

3.98 The offender was found guilty after trial of one offence of sexual intercourse with a child under the age of 10 years[45] and was sentenced to 10 years' imprisonment with a non-parole period of 6 years. The offender had been a friend of the victim's parents for several years and committed the offence while babysitting.

3.99 The offender appealed against his sentence on grounds which included that the sentencing judge erred by finding that the case fell within s 21A(5A) of the CSPA, thereby depriving them of the mitigating factor of good character.

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42. *Crimes Act 1900* (NSW) s 18(1)(a), s 19 (repealed).
43. *R v Early (No 8)* [2023] NSWSC 1222 [78].
44. *R v Early (No 8)* [2023] NSWSC 1222 [79].
45. *Crimes Act 1900* (NSW) s 66A(1).

3.100 Section 21A(5A) provides that "[i]n determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in committing the offence."

3.101 The CCA found that the judge erred in applying s 21A(5A) and thereby not taking the offender's prior good character into account.[46]

3.102 The Court noted, with reference to the second reading speech for the Bill introducing this provision, that, for s 21A(5A) to be engaged, there should generally be an active use of good character in committing the offence.[47] In this case, neither parent gave evidence that they thought the offender was of good character, or that the offender's character played a role in deciding to allow the offender to babysit.[48] The Court noted that numerous District Court judges had held at first instance that the situation is different in cases involving family friends than it is in cases involving, for example, child care workers and teachers.[49]

3.103 The CCA resentenced the offender to 8 years' imprisonment with a non-parole period of 2 years 9 months.

Proof of good character for sentencing

Richards v R [2023] NSWCCA 107

3.104 The offender, a teacher, pleaded guilty to six counts of indecent assault and one count of sexual assault with an act of indecency against a person under 16. The offences were committed over the period 1969-1986 against three victims who were students. The offender was sentenced to 8 years' imprisonment, with a non-parole period of 5 years.

3.105 One ground of appeal was that the sentencing judge erred in giving little weight to evidence of the offender's otherwise good character in the period after the offending. However, the CCA considered this finding was open to the judge. The Court observed that while a lack of convictions can be taken into account, a judge cannot sentence an offender on the basis they stopped offending at a certain time without evidence proving this on the balance of probabilities. The presumption of innocence is not relevant to sentencing.

3.106 The Court rejected all other grounds and dismissed the appeal.

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46. *Bhatia v R* [2023] NSWCCA 12 [147].
47. *Bhatia v R* [2023] NSWCCA 12 [145]–[146].
48. *Bhatia v R* [2023] NSWCCA 12 [143].
49. *Bhatia v R* [2023] NSWCCA 12 [138]–[139], [144].

Diagnostic evidence in victim impact statement

Campbell v R [2023] NSWCCA 258

3.107 The offender was sentenced for three offences of detaining with the intention of obtaining an advantage, in circumstances of aggravation and causing actual bodily harm, destroying property, and contravening an apprehended domestic violence order (ADVO).[50] The offences were committed against a woman with whom he had been in a relationship for 7 months and who he believed to have been cheating on him. He received an aggregate sentence of 5 years 4 months' imprisonment, with a non-parole period of 3 years 4 months.

3.108 One ground of appeal was that the sentencing judge erred in finding that the victim had sustained post-traumatic stress disorder (PTSD) and other long-term consequences, based the VIS.

3.109 At sentencing, the VIS was received without objection, and the offender made no submission about it, other than that the offender "acknowledged that the damage to the victim went further than the mere bruises or the injuries that she suffered".

3.110 In relation to the VIS, the sentencing judge remarked:

> It is clear that she has ... ongoing issues with her finger. ... It impedes her ability to do daily chores ...[and] led to the ending of her career as a barista. ... She clearly suffers from PTSD ... She has flashbacks. She has emotional outpourings; again, which are typical of the consequences of this kind of quite horrific experience and PTSD.[51]

3.111 The offender argued that a sentencing court could rely on a VIS to find that some psychological damage was caused, but in the absence of any medical evidence, could not make a qualitative or quantitative assessment of the extent of the harm, or diagnose health conditions such as PTSD. The offender argued that finding the victim had sustained long-term injuries to her finger and psychiatric injury must have elevated the seriousness of the offending for the sentencing purpose of recognising harm to a victim.

3.112 The CCA allowed this ground. The Court found that the sentencing judge had made a finding for which there was no proper basis before him and that the diagnostic labelling may have affected the exercise of sentencing discretion in relation to the indicative term for the detaining offence and ultimate aggregate sentence.[52] The sentencing remarks showed that the judge had regarded the harm done to the victim as a significant factor in sentencing.

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50. *Crimes Act 1900* (NSW) s 86(2)(b), s 195(1)(a); *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14(1).
51. *Campbell v R* [2023] NSWCCA 258 [31].
52. *Campbell v R* [2023] NSWCCA 258 [52].

3.113 The court set aside the sentence and resentenced the offender but did not impose sentences that were less than the original sentences.

Imposing intensive correction orders

3.114 Section 66 of the *Crimes Sentencing Procedure Act 1999* (CSPA) provides that, in relation to imposing an intensive correction order (ICO):

- community safety is the paramount consideration when a court is deciding whether to impose an ICO
- when considering community safety, a court must assess whether making the ICO or imposing a sentence of full-time imprisonment is more likely to address the offender's risk of reoffending, and
- when deciding whether to impose an ICO on an offender, the court must consider the purposes of sentencing under s 3A of the CSPA, relevant common law sentencing principles and any other matter the court considers relevant.

3.115 The following paragraphs summarise cases that deal with s 66.

Consideration mandatory where question of ICO is properly raised

***Stanley v DPP* [2023] HCA 3**

3.116 The offender pleaded guilty in the Local Court to 10 firearms offences involving firearms, firearm parts and ammunition that her cousin stored on her property. She received an aggregate sentence of 3 years' imprisonment with a non-parole period of 2 years.

3.117 On a severity appeal to the District Court, the offender argued that she should serve a term of imprisonment in the community by way of an ICO.[53] The District Court confirmed the sentence imposed in the Local Court, without imposing an ICO, and dismissed the appeal. The District Court's reasons did not expressly refer to or make findings in relation to s 66(2) of the CSPA, which requires that, when considering community safety, a court should consider whether an ICO or full-time detention would better address the offender's risk of reoffending.

3.118 The offender then applied to the Court of Appeal to quash the District Court decision. She argued that the District Court was required to qualify its power to impose any sentence of imprisonment by the assessment under s 66(2), and failure to do so amounted to jurisdictional error. The majority found that the District Court did not properly consider s 66, but its failure did not amount to jurisdictional error, merely an error of law within the jurisdiction of the District Court. The Court of

53. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 5.

Appeal considered its jurisdiction did not extend to the correction of that error and dismissed the summons.[54]

3.119 The offender then appealed to the High Court. The appeal raised two issues:

- whether a District Court judge's failure to make the s 66(2) assessment in declining to make an ICO is a jurisdictional error reviewable by the Supreme Court of NSW, and
- whether the District Court failed to make that assessment.

3.120 The majority affirmed that the District Court failed to make the s 66(2) assessment and that failure constituted jurisdictional error. The Court stated that sentencing courts must consider whether to make an ICO and conduct the s 66(2) assessment where the matter is properly raised:

> In failing to undertake that assessment, the District Court Judge misconstrued s 66 and thereby both misconceived the nature of her function under s 7 of that Act and disregarded a matter that the *Sentencing Procedure Act* required to be taken into account as a condition or limit of jurisdiction. Where the power to make an ICO is enlivened, a sentencing court does not have jurisdiction to decide that a sentence of imprisonment is to be served by full-time detention without assessing the comparative merits of full-time detention and intensive correction for reducing the offender's particular risk of reoffending.[55]

3.121 The majority detailed the required process, noting that s 66(1) requires community safety to be treated as the "paramount consideration". This means that when the court is deciding whether or not to make an ICO:

> community safety is the consideration to which other considerations are to be subordinated, although other considerations must or may be taken into account as prescribed by s 66(3).[56]

3.122 While the assessment in s 66(2) does not necessarily determine whether an ICO should be made, it is required in addressing community safety as the paramount, but not sole, consideration in deciding whether to issue an ICO.[57]

3.123 In this context:

> community safety principally concerns the possible harms to the community that might occur in the future from the risk of reoffending by the offender. The issue is not merely the offender's risk of reoffending, but the narrower risk of reoffending in a manner that may adversely affect community safety.[58]

3.124 The court clarified that, before the task of considering an ICO arises, a sentencing court will have considered aspects of community safety as part of the general

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54. *Stanley v DPP (NSW)* [2021] NSWCA 337.
55. *Stanley v DPP (NSW)* [2023] HCA 3 [54].
56. *Stanley v DPP (NSW)* [2023] HCA 3 [73].
57. *Stanley v DPP (NSW)* [2023] HCA 3 [75].
58. *Stanley v DPP (NSW)* [2023] HCA 3 [72].

purposes of sentencing (such as specific and general deterrence and protection of the community).[59] Section 66 requires community safety to be considered again and, specifically, the harms to community that might occur if the offender reoffends after or while in prison.

3.125 The appeal was allowed and the Court of Appeal orders were set aside as were the District Court orders dismissing the appeal. The High Court ordered that the District Court hear and determine the appeal according to law.

Effect of the High Court decision

3.126 Since this decision, it has been noted in the District Court that it has become "common" for there to be submissions for sentences of imprisonment to be served by way of an ICO.[60]

3.127 One CCA case, *Zheng*, which we are not otherwise describing, contains a useful summary of five points that emerge from the joint judgment in *Stanley*:

- The power to make an ICO requires an evaluation that treats community safety as the paramount consideration. The issue is not merely the risk of reoffending, but the narrower risk of reoffending in a way that may affect community safety.
- Section 66(2) assumes that an offender's risk of reoffending may be different depending on how the sentence of imprisonment is served, and "implicitly rejects any assumption that full-time detention of the offender will most effectively promote community safety".
- The nature and content of an ICO's conditions is important in measuring the risk of reoffending.
- The consideration of community safety required by s 66(2) must look forward to the risk of reoffending.
- While community safety is not the sole consideration in deciding whether to make an ICO, it usually has "a decisive effect unless the evidence is inconclusive".[61]

Considerations when imposing an ICO

Tonga v R [2023] NSWCCA 120

3.128 The offender pleaded guilty to recklessly causing grievous bodily harm,[62] following a road rage incident. He also pleaded guilty to a minor offence of failing to disclose

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59. *Stanley v DPP (NSW)* [2023] HCA 3 [77]. See also *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A.
60. *R v Holland* [2024] NSWDC 139 [88].
61. *Zheng v R* [2023] NSWCCA 64 [282]–[286] (citations omitted).
62. *Crimes Act 1900* (NSW) s 35(1).

the identity of the driver and other passenger in the car in which he had been travelling. He was sentenced to 22 months' imprisonment with a non-parole period of 13 months.

3.129 One appeal ground was that the sentencing judge, in declining to order that the sentence be served by way of an ICO, incorrectly applied the requirements of s 66 of the CSPA by giving weight to general deterrence in preference to community safety.

3.130 The sentencing judge had found that while making the offender serve his sentence in full-time imprisonment was not more likely to address his risk of reoffending, the weight to be given to general deterrence required the sentence be served by full-time imprisonment.[63]

3.131 The CCA dismissed the appeal, finding that the sentence judge correctly applied s 66. The Court considered that the decision as to whether or not to impose an ICO is not determined solely by "an assessment of the course more likely to address the offender's risk of reoffending; and when that course cannot be identified, other mandatory considerations will become significant and possibly decisive".[64]

Considerations when imposing ICOs for Commonwealth offences

Chan v R [2023] NSWCCA 206

3.132 The offender pleaded guilty to three offences against the *National Health Act 1953* (Cth) for making false claims on the Pharmaceutical Benefits Scheme.[65] He was sentenced to 2 years' imprisonment and ordered to be released on a recognizance release order after serving 14 months of the sentence.

3.133 Since these were Commonwealth offences, the sentencing judge took into account the matters that must be considered under Commonwealth sentencing law,[66] but did not take account of the purposes of sentencing under NSW law in the CSPA.[67] One ground of appeal was that, when considering whether to impose an ICO for the Commonwealth offences, the sentencing judge erred by failing to consider the NSW purposes of sentencing.

3.134 The CCA allowed this ground. The Court found that a sentencing judge must have regard to the NSW purposes of sentencing when considering whether to impose an

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63. *Tonga v R* [2023] NSWCCA 120 [39].
64. *Tonga v R* [2023] NSWCCA 120 [49].
65. *National Health Act 1953* (Cth) s 103(5)(g).
66. *Crimes Act 1914* (Cth) s 16A.
67. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A.

ICO. The Court affirmed that there are three stages to determining whether to impose an ICO:

- the court must be satisfied that no penalty other than imprisonment is appropriate
- if imprisonment is appropriate, the court must determine the duration, without considering how the sentence is to be served, and
- if the sentence is less than 2 years, the court must consider whether or not an ICO should be imposed.[68]

3.135 The Court found that where a court is sentencing an offender for Commonwealth offences, it must consider:

- the Commonwealth list of matters during the first two stages, and
- the NSW purposes of sentencing during the third stage.

This is because Commonwealth sentencing law picks up the power in the CSPA to impose an ICO and the required three stage process.[69]

3.136 In addition, the Court rejected a submission that the purposes of sentencing in the Commonwealth and the NSW legislation were sufficiently similar that the sentencing judge's consideration of only the Commonwealth list did not give rise to material error.[70] The Court found that despite the similarities between the provisions, there are a number of material differences and a court must consider community safety again in the third step and in a different manner.[71]

3.137 Justice Adams would have also allowed the appeal on the ground that the sentencing judge did not treat community safety as the paramount consideration when determining whether an ICO should be imposed.[72]

3.138 The Court allowed the appeal and resentenced the offender to imprisonment for 8 months 17 days to be served by way of an ICO.

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68. *Chan v R* [2023] NSWCCA 206 [79].
69. *Chan v R* [2023] NSWCCA 206 [96]; *Crimes Act 1914* (Cth) s 20AB.
70. *Chan v R* [2023] NSWCCA 206 [103]–[104].
71. *Chan v R* [2023] NSWCCA 206 [101].
72. *Chan v R* [2023] NSWCCA 206 [151]–[152].

Practice

Procedural fairness denied

Carl v R [2023] NSWCCA 190

3.139 The offender pleaded guilty to cultivating cannabis plants by enhanced indoor means for a commercial purpose.[73] Two further offences were also taken into account on sentence – dealing with property suspected of being proceeds of crime, and unauthorised possession of a prohibited weapon.[74] The offender was sentenced to 3 years 6 months' imprisonment, with a non-parole period of 2 years 1 month.

3.140 One ground of appeal was that the offender was denied procedural fairness when the sentencing judge departed from the prosecution's concession with respect to remorse. The prosecution had conceded that the offender was remorseful and "accepted responsibility for his offending on the evidence provided to the court".[75] However the sentencing judge departed from this joint position by finding that the offender's remorse was "somewhat limited".[76]

3.141 The majority of the CCA allowed this ground. The Court found that because the prosecution had already conceded the issue, and there had been no notification that the parties' submissions were not going to be accepted, the offender did not have an opportunity to be heard about the extent and significance of his remorse. In allowing this ground, the Court observed that "the concern of the law is to avoid practical injustice".[77] The offender had been denied procedural fairness because he was not given the opportunity to be heard on the extent and significance of remorse.

3.142 The Court also allowed the appeal on another ground and resentenced the offender to 1 year 2 months 27 days' imprisonment, to be served by way of an ICO.

Addressing the offender at sentencing

Giacometti v R [2023] NSWCCA 150

3.143 The offender pleaded guilty to seven offences including sexual intercourse without consent, intentional choking, assault occasioning actual bodily harm and reckless wounding.[78] Five further violent offences were taken into account on a Form 1.[79] The

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73. *Drug Misuse and Trafficking Act 1985* (NSW) s 23(1A).
74. *Crimes Act 1900* (NSW) s 193C(2); *Weapons Prohibition Act 1998* (NSW) s 7(1).
75. *Carl v R* [2023] NSWCCA 190 [69].
76. *Carl v R* [2023] NSWCCA 190 [69].
77. *Carl v R* [2023] NSWCCA 190 [85].
78. *Crimes Act 1900* (NSW) s 59(1), s 37(1), s 61I, s 35(4), s 344A(1).
79. *Crimes Act 1900* (NSW) s 61, s 59.

offender was sentenced to 14 years' imprisonment with a non-parole period of 9 years 9 months.

3.144 During the sentencing, the judge addressed the offender directly, in the second person. In dismissing the appeal, the CCA observed that it is no longer common for a judge to address an offender in this way when delivering their remarks on sentence. Such an approach was not to be encouraged, however:

> if a judge decides to address an offender directly in delivering a sentencing judgment, considerable care must be taken to ensure that the language employed does not betray a lack of judicial detachment or appear to descend into unmannerly and pejorative insult. That is so even in cases where, as here, the offending conduct may warrant such language in other contexts.[80]

Sentencing matters transferred from the Local Court

Chesworth v R [2023] NSWCCA 115

3.145 The offender pleaded guilty to one count of bestiality and offences of possess unauthorised firearm, supply prohibited drug (more than indictable quantity), and possess and disseminate child abuse material. He was sentenced to 3 years 6 months' imprisonment with a non-parole period of 2 years 1 month.

3.146 The sentencing judge set indicative sentences of 2 years 6 months' imprisonment for each of the child abuse material offences. These were indictable offences that could be tried summarily in the Local Court and were transferred to the District Court to be sentenced together with the bestiality offence.

3.147 One ground of appeal was that the sentencing judge erred by fixing indicative sentences above the 2-year jurisdictional limit in the Local Court.

3.148 The CCA found this was an error. The sentencing judge had taken indicative sentences into account in fixing the aggregate sentence, that were "unavailable". The Court proceeded to resentence the offender and set indicative sentences of 2 years for each child abuse material offence. While the Court considered a "slightly higher" aggregate sentence may have been appropriate, it decided not to impose a different sentence in the circumstances and, accordingly, dismissed the appeal.

Remitting a case to a single judge after a High Court appeal

R v Jacobs Group (Australia) Pty Ltd [2023] NSWCCA 280

3.149 The offender, a corporation, pleaded guilty to three offences of conspiring to bribe a foreign official.[81] The offender was sentenced in the NSW Supreme Court,[82] where

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80. *Giacometti v R* [2023] NSWCCA 150 [96].
81. Criminal Code (Cth) s 11.5(1), s 70.2(1)(a)(iv).
82. *R v Jacobs Group (Australia) Pty Ltd* [2021] NSWSC 657.

the parties disputed the interpretation of a statutory formula for calculating the maximum penalty for the offence.[83] The sentencing judge accepted the offender's interpretation. The Crown appealed to the CCA.[84] That Court upheld the sentencing judge's decision and dismissed the appeal.

3.150 The prosecution appealed to the High Court which found in its favour.[85] The High Court set aside the CCA's order dismissing the appeal and remitted the matter to that Court for redetermination of that part of the prosecution's appeal under s 5D of the *Criminal Appeal Act 1912* (NSW).

3.151 In this case,[86] the CCA was required to determine whether it should undertake the resentencing exercise or whether it should remit the matter to a single judge of the Supreme Court for resentencing under s 12(2) of the *Criminal Appeal Act 1912* (NSW).

3.152 The prosecution submitted that, while s 12(2) provides a general power to remit a matter, primacy should be given to s 5D and the CCA's "obligation" to proceed to resentence. The prosecution argued that the CCA should remit only where there is a positive reason why it cannot do justice in resentencing, or that makes a trial court better suited to resentencing, such as the need for further evidence that is likely to be contested.[87]

3.153 The court rejected this construction as it would tend to deny an offender the "right to effective appeal against sentence" when the sentencing process has miscarried.[88]

3.154 The Court explained that s 12 confers on it wide powers, and a broad, general discretion to remit a matter to a trial court and to give directions about how that determination should be made. The decision whether to remit depends on each case, and in making that decision, the court may refer to the requirements of justice in the case in addition to ordinary principles of case management.[89]

3.155 The Court noted that the offender (as a corporation) was not in custody, which made re-sentencing less urgent, and that the parties' appeal rights would be preserved if the matter was remitted.[90] The CCA also noted that the offender was considering bringing in evidence that may be contested.

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83. *Criminal Code* (Cth) s 70.2(5).
84. *R v Jacobs Group (Australia) Pty Ltd* [2022] NSWCCA 152.
85. *R v Jacobs Group (Australia) Pty Ltd* [2023] HCA 23.
86. *R v Jacobs Group (Australia) Pty Ltd* [2023] NSWCCA 280.
87. *R v Jacobs Group (Australia) Pty Ltd* [2023] NSWCCA 280 [12].
88. *R v Jacobs Group (Australia) Pty Ltd* [2023] NSWCCA 280 [15].
89. *R v Jacobs Group (Australia) Pty Ltd* [2023] NSWCCA 280 [16]–[18].
90. *R v Jacobs Group (Australia) Pty Ltd* [2023] NSWCCA 280 [19].

3.156 The matter was remitted to a single judge for sentencing in accordance with the High Court orders.[91]

Residual discretion in inadequacy appeals

Kramer v R [2023] NSWCCA 152

3.157 The offender was found guilty of one count of sexual intercourse without consent against a person he met on a dating application.[92] The offender was sentenced to a community correction order for a period of two years. By the time of the appeal, the offender had completed the community work component of the order.

3.158 The appeal grounds included that the sentencing judge erred in assessing the objective seriousness of the offence and that the sentence was manifestly inadequate. The Court exercised its residual discretion not to interfere with sentencing and dismissed the appeal even though it had upheld these two grounds.

3.159 Factors relevant to the exercise of this discretion include that intervening would be unjust to the offender or impact the offender's progress towards rehabilitation.[93] Of relevance was the fact that the offender had completed his community service work hours and that full-time incarceration would impact his rehabilitation, considering his mental health concerns.[94]

Backdating a sentence to account for periods in custody

3.160 The following three cases deal with different circumstances giving rise to a question of backdating a sentence to account for periods in custody.

Mattiussi v R [2023] NSWCCA 289

3.161 The offender was found guilty after a jury trial in the District Court of two counts of sexual intercourse without consent against a person with whom he had been in a relationship for two months. He was also found guilty one count of intimidate with intent to cause fear of physical harm,[95] which involved taking the victim to remote bushland, making her dig her own grave and then threatening to cut her up with a chainsaw. The offender was sentenced to 7 years 6 months' imprisonment with a non-parole period of 5 years 3 months 2 days.

3.162 Between the offender's entry to custody following arrest and sentencing for these offences, he was convicted and sentenced for other offences in the Local Court,

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91. *R v Jacobs Group (Australia) Pty Ltd* [2023] HCA 23 [57].
92. *Crimes Act 1900* (NSW) s 61I.
93. *Kramer v R* [2023] NSWCCA 152 [217]–[218].
94. *Kramer v R* [2023] NSWCCA 152 [215]–[218].
95. *Crimes Act 1900* (NSW) s 61I; *Crimes (Domestic and Personal Violence) Act 2007 (NSW)* s 13(1).

resulting in a sentence of 14 months' imprisonment with a non-parole period of 9 months. The non-parole period (which was otherwise subject to automatic release) was not revoked by the Parole Authority. The entire Local Court sentence was served before the offender was sentenced for the District Court matters.

3.163 One ground of appeal was that the sentencing judge failed adequately to take into account the offender's period in pre-sentence custody by allowing credit for the 5 months during which he would otherwise have been on statutory parole for the Local Court offences.

3.164 The CCA allowed this ground. The Court found that the parole period of the Local Court offences should have been counted as part of the pre-sentence custody for the District Court offences as parole had not been revoked. The cause of the error was found to have been that the parties misled the judge by not accurately describing the periods of pre-sentence custody. The Court observed:

> The practice of *only* telling a judge that there was a period of pre-sentence custody of a certain number of years, months or days (or worse, just a large number of days which span months or years) is unhelpful and should be eschewed.[96]

3.165 The Court allowed another ground of appeal and resentenced the offender to 7 years 6 months' imprisonment with a non-parole period of 5 years 3 months, backdated to account for the 5 months of the parole period for the offences sentenced in the Local Court.

Kljaic v R [2023] NSWCCA 225

3.166 The offender pleaded guilty to offences of furiously driving a motor vehicle causing bodily harm and aggravated dangerous driving occasioning grievous bodily harm. The sentencing judge imposed an aggregate sentence of imprisonment of 4 years 6 months. The offender spent 199 days in pre-sentence custody. The sentencing judge backdated the sentence by this amount and a further 30 days to take into account extra-curial punishment experienced as a result of COVID-19 restrictions and lockdowns.

3.167 One ground of appeal was that the sentencing judge erred by backdating the sentence by the further 30 days, rather than limiting it to the actual time spent in pre-sentence custody.

3.168 The CCA rejected this ground of appeal. The Court found that the relevant provisions[97] make any time spent in custody a mandatory consideration. However, the provisions could not be construed:

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96. *Mattiussi v R* [2023] NSWCCA 289 [73] (emphasis in original).
97. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 24, s 47.

> so as to limit the words "any time" in the phrase "any time for which the offender has been held in custody in relation to the offence" only to the duration of the pre-sentence custody so that occurrences or conditions during that period could not be taken into account under those provisions by backdating beyond the actual period of pre-sentence custody.[98]

3.169 On a proper construction it was open to the sentencing judge to take into account the effect of the restrictions and lockdowns as part of considering "any time for which the offender has been held in custody in relation to the offence". The judge could also take these custodial circumstances into account by backdating the sentence by 30 days, in addition to the 199 days spent in pre-sentence custody.[99]

3.170 The Court rejected the other ground and dismissed the appeal.

Dib v R [2023] NSWCCA 243

3.171 The offender pleaded guilty to conspiracy to import a commercial quantity of a border-controlled drug.[100] He was sentenced to 18 years 2 months' imprisonment, with a non-parole period of 12 years. Before committing this offence, he was convicted of an unrelated offence, murder, and had spent around 3 years 8 months in custody. He appealed the murder conviction and was acquitted.

3.172 One ground of appeal was that the sentencing judge did not backdate the sentence to take into account the time spent in custody for the murder conviction.

3.173 The Court rejected this ground of appeal. It held that there is no provision in the *Crimes Act 1914* (Cth) or the CSPA that allows for backdating or taking into account pre-sentence custody for unrelated offences.[101] There is neither a "common law principle" nor "sentencing practice" that allows for this.[102]

3.174 The Court however allowed the appeal on a different ground.

Looking to statutory analogues when sentencing common law offences

Macdonald v R [2023] NSWCCA 253

3.175 The offender was found guilty in a judge alone trial of one count of conspiring to commit wilful misconduct in public office. The offender was sentenced to 9 years 6 months' imprisonment with a non-parole period of 5 years 6 months.

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98. *Kljaic v R* [2023] NSWCCA 225 [36].
99. *Kljaic v R* [2023] NSWCCA 225 [36]–[37].
100. *Criminal Code* (Cth) s 11.5(1), s 307.1(1).
101. *Dib v R* [2023] NSWCCA 243 [88]–[89].
102. *Dib v R* [2023] NSWCCA 243 [80], [102]–[103].

3.176 One ground of appeal was that the sentencing judge erred in giving minimal weight to a statutory analogue offence. The offences of conspiracy to commit an offence and wilful misconduct in public office are both common law offences without statutory maximum penalties. In light of this, the sentencing court was invited to have regard to a statutory analogue in determining the appropriate sentence. The offender submitted that the appropriate analogue was a Commonwealth offence.[103]

3.177 The CCA rejected this appeal ground. It found that a statutory offence created by another jurisdiction (in this case, the Commonwealth) does not assist in determining the State government's intention about the appropriate penalty for a common law offence. This is particularly the case where there are a number of other possible analogues in other jurisdictions with a variety of maximum penalties.

3.178 In dismissing this ground, the Court commented that there may be common law offences where an appropriate statutory analogue can be found. However, this should be governed by the principle that the court should seek to maintain coherence in sentencing generally, although this principle should be applied with caution. The Court also commented that, even where an appropriate statutory analogue is identified, a sentencing judge is not required to provide reasons for moving away from its maximum penalty.

3.179 The CCA dismissed the appeal on all grounds.

Application of superseded SNPPs

AC v R [2023] NSWCCA 133

3.180 The offender pleaded guilty to nine child sexual abuse offences, including six offences of indecent assault on a child under 10 years of age.[104] The offences were committed in 1987-2007, against four children who were relatives or relatives of friends. The offender was sentenced to 10 years' imprisonment with a non-parole period of 7 years 6 months. The offender was sentenced for the indecent assault offences on the basis that the relevant SNPP was 8 years.

3.181 One appeal ground was that the sentencing judge applied the incorrect SNPP for the offence. The offender submitted that the correct SNPP for the indecent assault offences was 5 years.

3.182 The six indecent assault offences (s 61M(2) offences) were committed before 1 January 2008. In 2008, the SNPP for the s 61M(2) offence was increased from

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103. *Criminal Code* (Cth) s 142.2.

104. *Crimes Act 1900* (NSW) s 61M(2) (repealed).

5 years to 8 years.[105] In 2018, s 61M(2) was repealed and replaced with a reformulated offence.[106]

3.183 An issue in the appeal was the interpretation of three provisions of the CSPA:

- cl 57 of the savings provisions,[107] which provides that the 2008 amendments to the Act apply retrospectively to the determination of a sentence
- cl 91 of the savings provisions,[108] which provides that the SNPPs in force prior to the 2018 amendments apply to offences against the repealed offence committed before the 2018 amendments and
- s 25AA(2), which provided that the SNPP for a child sexual offence was the SNPP that applied at the time of the offence, not at the time of sentencing.[109]

3.184 The majority of the Court allowed the appeal, finding that there was no inconsistency between these three provisions, stating that "they can be read together without distorting the clear language of s 25AA(2)".[110]

3.185 The Court considered that cl 57 should be read as subject to s 25AA(2) because s 25AA(2) was enacted later in time and was "extraordinarily clear in its language".[111] The Court considered further that cl 91 clarifies that although s 61M(2) and one other repealed offence no longer exist, the previous SNPPs continue to apply, addressing a scenario where a person was charged with the repealed offences before they were abolished.[112]

3.186 The Court allowed another ground of appeal and, on the basis of an SNPP for the indecent assault offences of 5 years, resentenced the offender to an aggregate sentence of 7 years' imprisonment with a non-parole period of 5 years 3 months.

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105. *Crimes (Sentencing Procedure) Amendment Act 2007* (NSW) sch 1 [10].
106. *Criminal Legislation Amendment (Child Sexual Abuse) Act* 2018 (NSW) sch 1 [7].
107. *Crimes (Sentencing Procedure) Act 1999* (NSW) sch 2 cl 57.
108. *Crimes (Sentencing Procedure) Act 1999* (NSW) sch 2 cl 91.
109. *Crimes (Sentencing Procedure) Act* 1999 (NSW) s 25AA(2) (repealed). See now *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21B(2) and (3).
110. *AC v R* [2023] NSWCCA 133 [67].
111. *AC v R* [2023] NSWCCA 133 [61].
112. *AC v R* [2023] NSWCCA 133 [64].

4. Sentencing for offences that are excluded from intensive correction orders

Intensive correction orders

4.1 The intensive correction order (ICO), as it is currently formulated,[1] was introduced as part of the 2018 reforms to sentencing. It effectively replaces the old ICO, home detention order and suspended sentences that were available before 24 September 2018.

4.2 If a court decides to sentence an offender to up to 2 years' imprisonment for a single offence or to an aggregate or effective sentence of up to 3 years for multiple offences, it may instead order that the offender serve the sentence in the community by way of an ICO. An ICO is not available for certain serious offences[2] which we outline broadly below.

4.3 If an offender fails to comply with any obligation under an ICO, the State Parole Authority (SPA) may take certain actions, including recording the breach, giving a formal warning, imposing conditions, varying or revoking conditions (that are not

1. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 5.
2. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67.

standard conditions) or revoking the ICO. If SPA revokes the ICO, the offender must serve the balance of the sentence by full-time imprisonment.

Aim of this review

4.4 The aim of this chapter is to examine the impact of the 2018 reforms on the category of offences that are not eligible for an ICO at sentencing.

4.5 The 2018 reforms:

- abolished the suspended sentence, and
- established an extensive list of offences that are not eligible for the new ICOs that in part, covered some of the field that suspended sentences previously occupied.

4.6 In our 2018 Annual Report, we examined sentencing patterns for excluded offences for the quarters before and after the commencement of the 2018 amendments. The Council's analysis indicated that there was a clear increase of several percentage points in the rate of the imposition of imprisonment for ICO excluded offences.[3]

Limitations of this review

4.7 We examined a list of excluded NSW offences. For simplicity, we looked at only those offences where the elements of the offence fell squarely within an exception. We did not look at offences with elements that may or may not fall within the exceptions. For example, weapons offences that may or may not involve firearms, and sexual offences that do not involve intercourse where the victim may be over or under 16.

4.8 Broadly, the NSW offences that we looked at cover the following broad categories:

- offences against adults involving sexual intercourse
- offences against children involving sexual intercourse
- other sexual offences against children
- offences involving exploitation of children (including pornography and trafficking), and
- homicide.

4.9 We looked only at adult sentencing outcomes, as ICOs are not available for juvenile offenders.

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3. NSW Sentencing Council, *Sentencing Trends and Practices: Annual Report 2018* (2019) [4.68]–[4.69].

4.10 We also attempted, where possible, to exclude these offences when they involved inchoate or accessorial liability. Not all of these forms of liability are covered by the exclusion, and it was too difficult to separate out the individual components through modifiers in the court data.

4.11 We looked at the 18 quarters before the reforms were introduced (January 2014 – June 2018) and the 19 quarters after the reforms were introduced (October 2018 – June 2023). We excluded the quarter in which the new penalties were introduced, July to September 2018.

4.12 The comparison was between three groups of penalties:

- imprisonment, which applied before and after the reforms
- suspended sentences, which applied before the reforms, and
- other penalties, which applied to all other sentences (home detention, old intensive correction orders, community service orders, fines and bonds, before the reforms and community correction orders, conditional release orders and fines, after the reforms).

4.13 In four cases the data disclosed a suspended sentence being imposed after the reforms when such a sentence was not available. We included these in the "other" category.

4.14 Also, in 27cases the data disclosed an ICO being applied after the reforms. These 27 out of 3,449 post-reform cases were perhaps inchoate or accessorial offences that we could not exclude from the sample or that were possibly imposed in error. This is understandable, given the size and complexity of the list of excluded offences. We know that some of them were corrected on appeal. We excluded these from the sample.

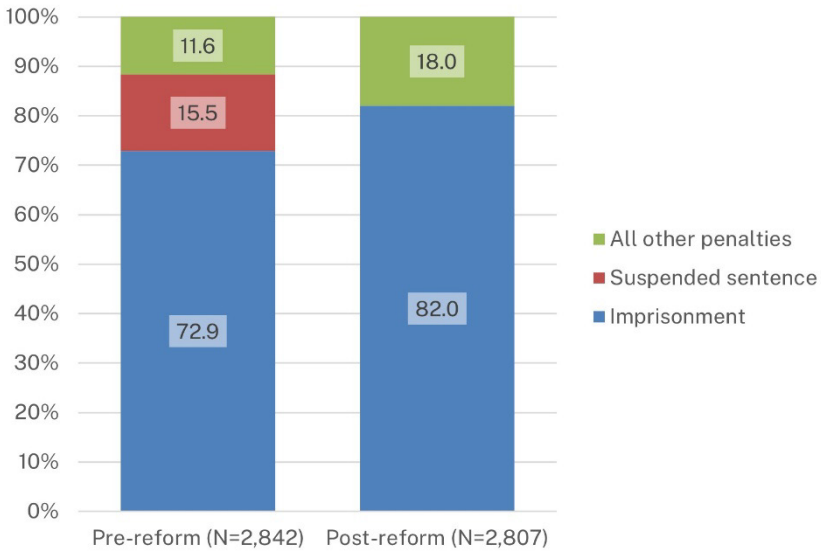
Statistics

General

4.15 Figure 4.1 shows that before the reforms, 15.5% of the selected cases outlined earlier[4] resulted in a suspended sentence. After the reforms, the percentage of these selected cases resulting in imprisonment increased from 72.9% to 82% and those receiving all other penalties increased from 11.6% to 18%.

4. See [4.6].

Figure 4.1: Proportion of penalties for ICO excluded offences, before and after the 2018 reforms, January 2014 – June 2023

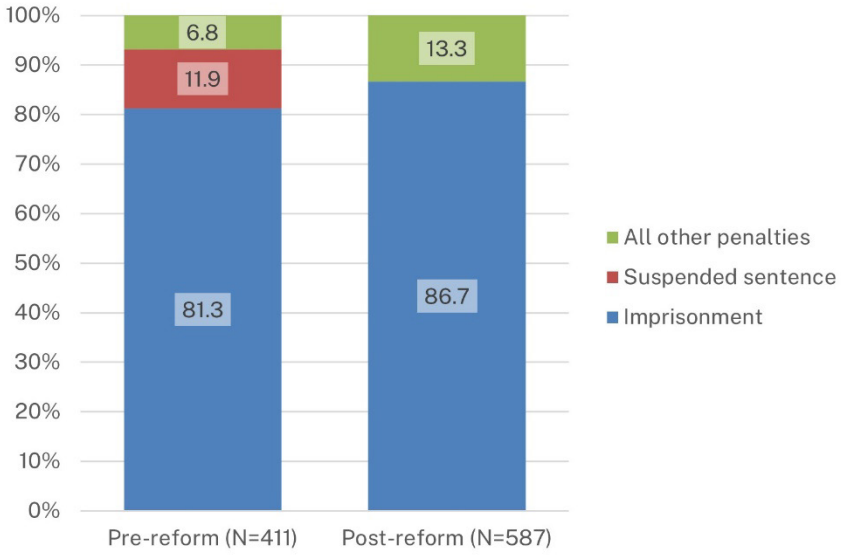


Pre reform: January 2014 – June 2018; Post-reform: October 2018 – June 2023.
Source: NSW Bureau of Crime Statistics and Research, Dvn 2323063.
The data tables for this figure are in Appendix A.

Aboriginal offenders

4.16 Figure 4.2 shows that before the reforms, 11.9% of the selected cases involving Aboriginal offenders resulted in a suspended sentence. After the reforms, the percentage of these selected cases resulting in imprisonment increased from 81.3% to 86.7%, and those receiving all other penalties increased from 6.8% to 13.3%.

Figure 4.2: Proportion of penalties for ICO excluded offences for Aboriginal offenders, before and after the 2018 reforms, January 2014 – June 2023

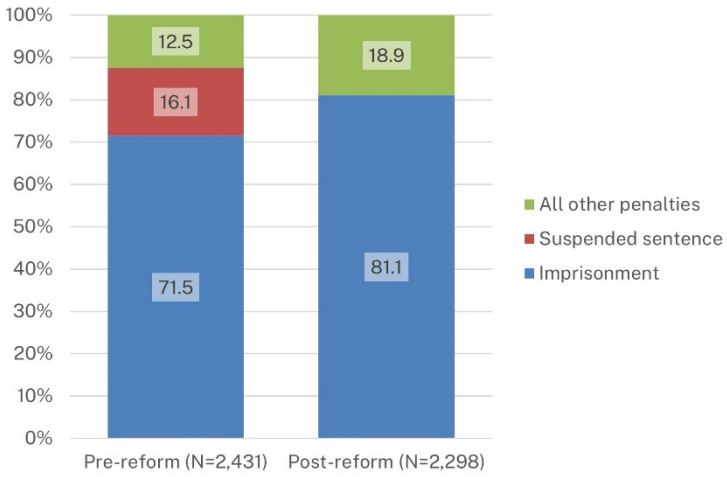


Pre reform: January 2014 – June 2018; Post-reform: October 2018 – June 2023.
Source: NSW Bureau of Crime Statistics and Research, Dvn 2323063.
The data tables for this figure are in Appendix A.

4.17 These figures are different from the figures for offenders who were not identified as Aboriginal (set out in Figure 4.3), in part because of the general overrepresentation of Aboriginal offenders in the imprisonment statistics.

4.18 Figure 4.3 shows that, before the reforms, 16.1% of the selected cases resulted in a suspended sentence. After the reforms, the percentage of the selected cases resulting in imprisonment increased from 71.5% to 81.1%, and those receiving all other penalties increased from 12.5% to 18.9%.

Figure 4.3: Proportion of penalties for ICO excluded offences of offenders not identified as Aboriginal, before and after the 2018 reforms, January 2014 – June 2023



Pre reform: January 2014 – June 2018; Post-reform: October 2018 – June 2023.
Source: NSW Bureau of Crime Statistics and Research, Dvn 2323063.
The data tables for this figure are in Appendix A.

Offence type

4.19 Subject to two exceptions – homicide and offences involving intercourse with children (which we outline below) – the percentage of most groups of offences that received a suspended sentence before the reforms was distributed relatively evenly between imprisonment and other penalties post-reform. This involved net-widening to the extent that some of the percentage the proportion that previously received a suspended sentence received a sentence of imprisonment after the reforms.

4.20 In the case of homicide and offences involving intercourse with children, almost all of the percentage of cases that received suspended sentences went to increase the percentages of those who received imprisonment after the reforms. There was almost no increase in the percentage of cases that received any other penalty.

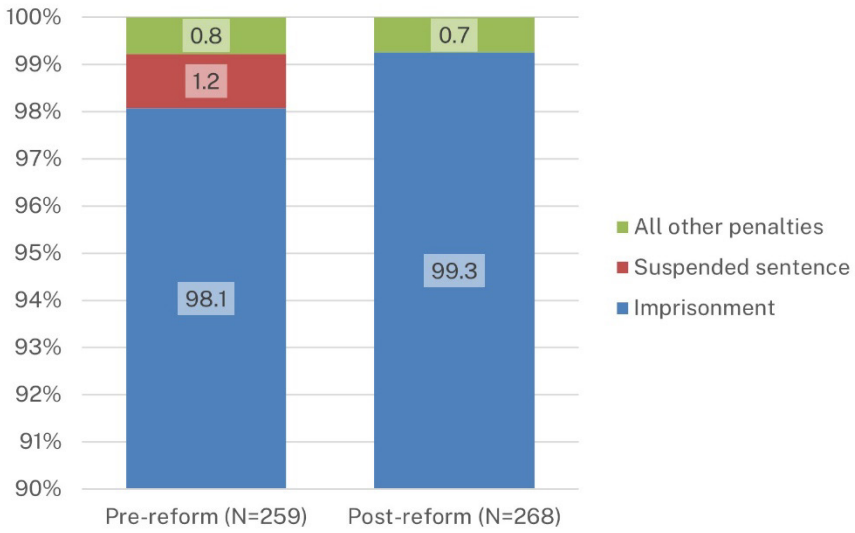
4.21 These two offences generally represent the most serious offences of the ICO excluded offences and the increase in the percentage of cases resulting in imprisonment for these offences could be seen as a desirable outcome.

Homicide

4.22 Before the reforms, 1.2% of the cases where homicide was the principal offence received suspended sentences. After the reforms, the percentage of the homicide cases that resulted in imprisonment increased from 98.1% to 99.3%. The small proportion of suspended sentences (1.2%) effectively absorbed the cases receiving suspended sentences pre-reform. This is shown in Figure 4.4.

4.23 However, this data is based a relatively small number of cases (254) in the relevant period before the reforms, and 266 cases in the period after the reforms.

Figure 4.4: Proportion of penalties for ICO excluded homicide offences, before and after the 2018 reforms, January 2014 – June 2023

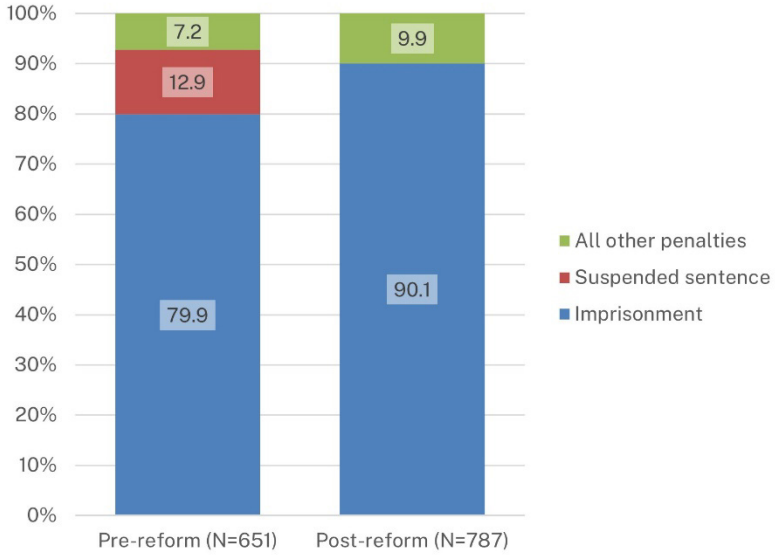


Pre reform: January 2014 – June 2018; Post-reform: October 2018 – June 2023.
Source: NSW Bureau of Crime Statistics and Research, Dvn 2323063.
The data tables for this figure are in Appendix A.

Offences involving intercourse with children

4.24 Before the reforms, 12.9% of the cases where the principal offence related to offences involving intercourse with children resulted in suspended sentences. Figure 4.5 shows that, after the reforms, the percentage of cases for these offences that resulted in imprisonment increased from 79.9% to 90.1%, effectively absorbing the cases receiving suspended sentences pre-reform.

Figure 4.5: Proportion of penalties for ICO excluded offences involving intercourse with children, before and after the 2018 reforms, January 2014 – June 2023



Pre reform: January 2014 – June 2018; Post-reform: October 2018 – June 2023.
Source: NSW Bureau of Crime Statistics and Research, Dvn 2323063.
The data tables for this figure are in Appendix A.

Background

The current provision

4.25 The current list of ICO exclusions is:

(a) murder or manslaughter,

(b) a prescribed sexual offence,

(c) a terrorism offence within the meaning of the *Crimes Act 1914* of the Commonwealth or an offence under section 310J of the *Crimes Act 1900*,

(d) an offence relating to a contravention of a serious crime prevention order under section 8 of the *Crimes (Serious Crime Prevention Orders) Act 2016*,

(e) an offence relating to a contravention of a public safety order under section 87ZA of the *Law Enforcement (Powers and Responsibilities) Act 2002*,

(f) an offence involving the discharge of a firearm,

(g) an offence that includes the commission of, or an intention to commit, an offence referred to in paragraphs (a)–(f),

(h) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in paragraphs (a)–(g).[5]

4.26 A "prescribed sexual offence", when a NSW offence, is an offence under the *Crimes Act 1900* (NSW) that is:

5. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67(1).

- a sexual offence or an offence of sexual servitude against:
  - a person under 16, or
  - a person of any age and sexual intercourse is an element of the offence
- an offence involving child prostitution or child abuse material
- a voyeurism offence involving a person under 16, or
- a substantially similar offence.[6]

Abolition of suspended sentences

4.27 The 2018 reforms[7] also abolished suspended sentences.

4.28 The NSW Law Reform Commission (LRC), in the report that led to the 2018 reforms, considered that the suspended sentence was a conceptually and practically flawed sentencing option that could be both too lenient (if its conditions were not breached) and too severe (if its conditions were breached).

4.29 The new ICO was introduced into the space previously occupied by the abolished penalties of the suspended sentence, the old intensive corrections order and home detention.

4.30 The LRC noted that the proposed new order could substantially replicate a suspended sentence for offenders who did not have criminogenic or other factors that needed to be addressed. It considered that the ICO's additional requirements could strengthen what was otherwise regarded as an overly lenient sentence.[8] The exclusion of the ICO for certain offences could be said to undermine the intention for this class of offenders.

History of the exclusions

Home detention

4.31 The recent practice of excluding offences from certain penalties first arose in relation to home detention in 1996.[9] These exclusions continued[10] until home detention was abolished as a standalone sentencing option and made a potential condition of an ICO in the 2018 reforms.

4.32 That list of exclusions was more extensive than the current ICO exclusion list. Notable additional exclusions in the home detention exclusion list involved:

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6. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67(2) definition of "prescribed sexual offence".
7. *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW).
8. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [0.29], [10.34], [11.9].
9. *Home Detention Act 1996* (NSW) s 6, as repealed by *Crimes Legislation Amendment (Sentencing) Act 1999* (NSW) sch 1.
10. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 76 (repealed).

- armed robbery
- assaults causing either actual bodily harm or grievous bodily harm, and
- certain commercial quantity drug offences.

4.33 Further, the home detention exclusions only required the use of a firearm or imitation firearm and not the discharge of a firearm as is now required.

4.34 The second reading speech for the original provisions stated that the effect of the exclusions and other provisions would be "to exclude immediately any person who, because of the seriousness of their offence or the nature of their criminal history, may present a threat to the safety of the community".[11]

The original ICO

4.35 The original ICO was introduced in 2010. The only exclusion from this penalty was for a "prescribed sexual offence".[12]

Criticism of the exclusions

Less serious penalties are still available

4.36 Since the exclusions only operate in relation to ICOs, less serious penalties are still available for offenders for whom imprisonment is not appropriate. As one District Court judge observed:

> It seems more than a little odd that a Community Correction Order is available whereas an Intensive Correction Order which is a more severe and onerous disposition for an offender is not available … The offender in the present matter is one of the more deserving of an Intensive Correction Order that I have encountered since the sentencing reforms of 2018. It is a matter of considerable regret that I am unable to extend that disposition to this offender. I remain firmly of the opinion that if the law permitted the offender to serve the sentence by way of Intensive Correction Order it would be the appropriate course in this matter.[13]

4.37 In our 2021 report on homicide, we noted that the exclusion of ICOs from sentencing for manslaughter, and the continuing availability of less serious non-custodial penalties (such as CCOs and CROs) was anomalous and we recommended allowing courts to impose ICOs for manslaughter in appropriate cases.[14]

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11. New South Wales, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 20 June 1996, 3385.
12. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 66, as amended by *Crimes (Sentencing Procedure) Amendment Act 2010* (NSW) sch 2 [18].
13. *R v Toyer* [2021] NSWDC 92 [6], [8].
14. NSW Sentencing Council, *Homicide,* Report (2021) [7.44]–[7.48].

4.38 The current arrangements can also be said to distort sentencing practice around the question of the custodial threshold.[15] It appears that some cases that previously crossed the custodial threshold before the reforms and received a suspended sentence are now receiving CCOs which, in theory, cannot be applied once the custodial threshold is crossed. This means that the unavailability of the ICO (which is a custodial penalty) is influencing the question of whether an offender has crossed the custodial threshold.

Inappropriate or inflexible exclusions

4.39 The inappropriateness of inflexible and arbitrarily applied exclusions for non-custodial sentencing options has been raised a number of times.

4.40 When proposing the basis for the ICO scheme in our 2007 report on periodic detention, we noted the exclusions that applied to periodic detention and home detention but did "not envisage that in the present context such restrictions should operate by way of an automatic exclusion … [r]ather they should be matters taken into account in the suitability assessment".[16]

4.41 A survey of judicial officers conducted by the Sentencing Council in 2011, showed a strongly held view among some respondents of the need to remove arbitrary offence-related restrictions on alternatives to full-time imprisonment.[17]

4.42 The LRC's 2013 report on sentencing also highlighted the general inappropriateness of exclusions for sentencing options:

> Rigid exclusions that pay no regard to the objective circumstances of the case, or to the subjective circumstances of the offender, can operate to inappropriately limit the sentencing discretion that is important for a viable sentencing system.[18]

4.43 In its 2017 report on the incarceration rate of Aboriginal and Torres Strait Islander peoples, the Australian Law Reform Commission (ALRC) noted that such things as ICO exclusions could contribute to the disproportionate incarceration rates of Indigenous people:

> Where offences are excluded by legislation, the types of offences excluded under some community-based sentencing regimes may be contributing to Aboriginal and Torres Strait Islander offenders being under-represented as recipients of community-based sentences compared to imprisonment.[19]

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15. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(1).
16. NSW Sentencing Council, *Review of Periodic Detention,* Report (2007) [7.73].
17. NSW Sentencing Council, *Judicial Perceptions of Suspended Sentences Survey* (2011), Respondents 1, 2, 4, 7, 12, 17, 21, 22, 29, 30, 31, 38, 45, 57, 68, 84, 85, 88, 90, 95, 98, 118, 125, 127, 129. NSW Sentencing Council, *Sentencing Trends and Practices: Annual Report 2011* ((2012) [3.85].
18. NSW Law Reform Commission, *Sentencing,* Report No 139 (2013) [9.41].
19. Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples,* Report 133 (2017) [7.44].

4.44 The ALRC went on to state that the effect of the exclusion of violent offences from community-based sentences "is that Aboriginal and Torres Strait Islander people may be sentenced to short terms of imprisonment when they commit low-to-mid range violent offences — a criminal justice response which is unlikely to aid in terms of rehabilitation or reducing reoffending".[20]

20. Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples,* Report 133 (2017) [7.44].

5. The Council's work

Functions and membership

Functions of the Council

5.1 The Sentencing Council has the following functions under s 100J of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (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.

Council members

5.2 Section 100I(2) of the CSPA provides that the Sentencing Council is to consist of 16 members with various qualifications.

5.3 The Sentencing Council's membership, as at 31 December 2023, is set out below.

Chairperson

The Hon Peter McClellan AM, KC	Retired judicial officer

Members

Acting Magistrate Timothy Keady	Retired magistrate
Assistant Commissioner Scott Cook APM	Member with expertise or experience in law enforcement
Ms Sally Dowling SC	Member with expertise or experience in criminal law or sentencing – prosecution
Ms Belinda Rigg 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
Ms Kerrie Thompson	Community member - experience in matters associated with victims of crime
Ms Thea Deakin-Greenwood	Community member - experience in matters associated with victims of crime
Mr Craig Hughes-Cashmore	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 Mark Follett	Representative of the Department of Justice
Professor John Anderson	Member with relevant academic or research expertise or experience

5.4 Professor John Anderson was reappointed for a 3-year term on 8 September 2023.

5.5 There were two vacancies at the end of 2023.

The Council's projects

5.6 In 2023, we had two ongoing reviews:

- a review of sentencing for fraud and fraud-related offences, and
- a review of sentencing for firearms, knives and other weapons offences.

Fraud

Terms of reference

5.7 The following terms of reference were issued by the former Attorney General on 21 September 2021:

> The Sentencing Council is asked to conduct a review of sentencing for fraud and fraud-related offences in New South Wales, especially but not limited to offences in Part 4AA of the Crimes Act 1900 (NSW), and make any recommendations for reform that it considers appropriate.
>
> In undertaking this review, the Sentencing Council should:
>
> 1. provide sentencing statistics for convictions over a five year period;
> 2. provide information on the characteristics of offenders, sentence type and length; and
> 3. provide background information, including:
>   a. the key sentencing principles and reasoning employed by sentencing judges;
>   b. the mitigating subjective features of offenders; and
>   c. any other significant factors considered in sentencing decisions that explain how courts come to their final decision on sentence (which may be done using case-studies or collation of predominate themes across cases)

Submissions and consultations

5.8 We invited preliminary submissions on 25 October 2021**.** The deadline for submissions was 31 January 2022. We received eight preliminary submissions from a range of legal and justice stakeholders, as well as members of the public.

5.9 We conducted preliminary consultations with various people and organisations with experience of fraud offending and fraud offenders, including defence and prosecution agencies, government agencies and academics.

5.10 We released a consultation paper in September 2022[1] and received 14 submissions in response from a range of legal and justice stakeholders, members of the public, academics and non-government agencies.

5.11 The consultation paper, and most of the submissions made to the review, can be viewed on our website.

Report and recommendations

5.12 We transmitted our report to the Attorney General on 14 June 2023. We released the report on 31 July 2023.[2] It can be viewed on our website.

5.13 Given most fraud and fraud-related offences are finalised in the Local Court, where decisions are not routinely published, the report includes a sample of cases finalised in the Local Court at various locations around the State.

5.14 Overall, we found that there was general satisfaction with the sentences imposed for fraud and fraud-related offences.

5.15 We made three recommendations, to:

- establish a tiered penalty structure based on the value of the fraud
- make victim impact statements available for victims of fraud in the Supreme Court and District Court, and
- give consideration to expanding the operation of diversion programs for offenders with drug, alcohol and/or gambling problems as far as possible given resource constraints.

Firearms, knives and other weapons

Terms of reference

5.16 The following terms of reference were issued by the former Attorney General on 4 November 2022:

> The Sentencing Council is asked to conduct a review of sentencing for firearms, knives and other weapons offences (focusing on but not limited to offences involving the use or carrying of firearms, knives and other weapons), and make any recommendations for reform that it considers appropriate.

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1. NSW Sentencing Council, *Fraud*, Consultation Paper (2022).
2. NSW Sentencing Council, *Fraud*, Report (2023).

In undertaking this review, the Sentencing Council should:

1. provide sentencing statistics for convictions and penalty notices (where relevant) over a five year period;
2. provide information on the characteristics of offenders, sentence type and length;
3. provide background information, including:
    a. the key sentencing principles and reasoning employed by sentencing judges;
    b. the mitigating subjective features of offenders; and
    c. any other significant factors considered in sentencing decisions that explain how courts come to their final decision on sentence (which may be done using case-studies or collation of predominate themes across cases);
4. consider whether the standard non parole periods where identified remain appropriate;
5. consider whether offences for which penalty notices are available remain appropriate;
6. consider whether the maximum penalties for the offences are appropriate with reference to other jurisdictions;
7. consider whether any existing summary offences should be made indictable offences;
8. consider any other matter the Council considers relevant.

Submissions and consultations

5.17 Preliminary submissions on the terms of reference opened on 5 December 2022 for three months. We received 13 preliminary submissions from members of the public, as well as a range of legal and justice agencies. Most of these submissions are available on our website.

5.18 We conducted consultations, specifically on knife offences, from June to September 2023. The consultations were targeted at prosecutors, defence, stakeholders with expertise in children and young people, and young people with lived experience of weapons crime.

5.19 In September and October 2023, we released a consultation paper and an issues paper.[3] The consultation paper focused on weapons related offending by adults. The issues paper focused on young offenders and weapons related crime.

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3. NSW Sentencing Council, *Weapons-Related Offences: Sentencing Adult Offenders*, Consultation Paper (2023); NSW Sentencing Council, *Weapons-Related Offences: Sentencing Young Offenders*, Issues Paper (2023).

5.20 We received 19 submissions to the consultation paper and the issues paper between December 2023 and February 2024 and commenced writing the report. A summary of this stage of the project will be available in our 2024 Annual Report.

Other Council business

Meetings

5.21 The Council meets monthly, with business being completed at these meetings and out of session.

5.22 All meetings were held with remote connections for those unable to attend in person in 2023.

People

5.23 The Law Reform Commission and Sentencing Council Secretariat (the Secretariat) supports the Council's work. The Secretariat is part of the Policy, Reform and Legislation Branch, within the Law Reform and Legal Services Division of the Department of Communities and Justice.

5.24 The following people worked with the Secretariat for at least part of 2023:

- Dr Jackie Hartley, Policy Manager
- Ms Alexandra Sprouster, Policy Manager
- Ms Sophie Sauerman, Senior Policy Officer
- Ms Laura Schultz, Senior Policy Officer
- Mr Joseph Waugh PSM, Senior Policy Officer
- Dr Nikki Edwards, Policy Officer
- Ms Carol Hoang, Policy Officer
- Ms Madison Thompson, Policy Officer
- Ms Claudia McGuiness, Graduate Policy Officer
- Mr Peter Hassmann, Graduate Policy Officer, and
- Ms Anna Williams, Research Support and Librarian.

5.25 Our paid winter internship program takes place during the university vacation. Student interns make significant contributions to research and writing on a range of projects. The following people worked with the Secretariat, and contributed to the Sentencing Council's work, as part of the 2023 winter internship program:

- Ms Angela Xu, University of Sydney, and
- Mr Joseph Verity, University of Sydney.

Communications and engagement

"Sentencing Explained" podcast

5.26 The "Sentencing Explained" podcast was launched in 2022, as part of our community education function. Eight episodes were released in 2022. In 2023, a further 11 episodes were released. The podcast links are available on our website.

5.27 Each episode features the Chair of the NSW Sentencing Council, the Hon Peter McClellan AM KC, in conversation with expert guests including judicial officers, police, public interest lawyers, prosecutors, victims' advocates, and Sentencing Council members. The episodes provide a window into the NSW justice system for Legal Studies students, law students, lawyers, and anyone interested in criminal law.

5.28 The primary target audience is secondary school students taking Legal Studies in years 11 and 12. Study guides, prepared by Council member, Wayne Gleeson are available with every episode to help students strengthen their understanding of the content.

5.29 Episodes released in 2023 were:

- **Episode 9:** Talking sentencing law, education and society with Wayne Gleeson
- **Episode 10:** Youth justice and sentencing with Children's Court President Ellen Skinner
- **Episode 11:** Sentencing in the Local Court with Deputy Chief Magistrate Theo Tsavdaridis
- **Episode 12:** Delving into the Drug Court with Senior Judge Jane Mottley
- **Episode 13:** Spotlight on the appeals process with Justices Robert Beech-Jones and Derek Price
- **Episode 14:** Prison and community corrections with retired Commissioner of Corrective Services Peter Severin
- **Episode 15:** Exploring victims' rights and experiences in sentencing with Professor Tracey Booth
- **Episode 16:** Sentencing Aboriginal offenders on the Walama List with Justice Dina Yehia
- **Episode 17:** Circle Sentencing with Maree Jennings
- **Episode 18:** Aboriginal people and the criminal justice system with Magistrate Mark Douglass
- **Episode 19:** An insight into parole with the Hon James Wood AO KC

5.30 A series of videos, featuring some Council members who were guests on the podcast, was rolled out after the release of the last episode.

Website

5.31 In the second half of 2023, we reviewed the operation of our new website which was launched in 2022. In the first six months of 2023, the website had over 22,000 unique views and almost 8,000 individual views. The Sentencing Explained podcast page and the home page were the most visited pages with 4,500 clicks; other pages had several hundred views, including the completed projects page, the 2021 HSC Legal Studies exam page, and the penalties page.

HSC Legal Studies

5.32 Each year, the Sentencing Council uploads the HSC Legal Studies exam questions and answers that are relevant to sentencing law to our website. The 2022 HSC Legal Studies exam papers were made available in 2023.

Collaboration

5.33 We have maintained close working relationships with the Bureau of Crime Statistics and Research, the Secretariat's colleagues within the Policy, Reform and Legislation Branch, Corrections Research Evaluation and Statistics, and other parts of the NSW Department of Communities and Justice.

5.34 The chairperson and a member of the Secretariat met with all the sentencing councils of Australia in Melbourne on 23 June 2023. There was interest in cooperation across the councils on particular issues.

Appendix A: Data tables

Figure 1.1: NSW higher and local criminal courts, principal penalties imposed, 2023

Penalty	No	%
Prison > 6 mth	7,067	6.1
Prison ≤ 6 mth	3,295	2.8
ICO	5,676	4.9
CCO	23,726	20.3
CRO with conviction	4,838	4.1
Fine	45,424	39.0
Conviction only	4,314	3.7
CRO w/o conviction	17,178	14.7
No conviction	5,103	4.4
Total	116,621	100.0

Source: NSW Bureau of Crime Statistics and Research, reference 24-23463.

Figure 1.2: NSW higher and local criminal courts, principal penalties imposed for each year, 2019 – 2023

	2019		2020		2021		2022		2023	
	No	%	No	%	No	%	No	%	No	%
Prison > 6 mth	8,727	7.7	7,978	7.7	7,277	6.8	7,555	6.4	7,067	6.1
Prison ≤ 6 mth	2,927	2.6	3,083	3.0	3,257	3.0	3,185	2.7	3,295	2.8
ICO	7,482	6.6	6,344	6.1	6,268	5.9	5,807	4.9	5,676	4.9
CCO	23,205	20.5	21,730	21.0	21,383	20.0	22,077	18.7	23,726	20.3
CRO with conviction	5,219	4.6	3,772	3.6	3,931	3.7	4,674	4.0	4,838	4.1
Fine	41,116	36.4	40,664	39.2	44,159	41.2	49,235	41.7	45,424	39.0
Conviction only	3,321	2.9	3,631	3.5	3,382	3.2	4,049	3.4	4,314	3.7
CRO w/o conviction	16,476	14.6	12,579	12.1	13,313	12.4	16,053	13.6	17,178	14.7
No conviction	4,509	4.0	3,877	3.7	4,104	3.8	5,322	4.5	5,103	4.4
Total	112,982	100.0	103,658	100.0	107,074	100.0	117,957	100.0	116,621	100.0

Source: NSW Bureau of Crime Statistics and Research, reference 24-23463.

Figure 1.3: Distribution of penalties among Aboriginal men and non-Aboriginal men in NSW higher and local criminal courts, 2023

	Aboriginal (N=23,086)	Non-Aboriginal/ unknown (N=65,637)	Total offenders
Prison > 6 mth	12.9%	5.4%	6,482
Prison ≤ 6 mth	7.0%	2.0%	2,935
ICO	6.8%	4.7%	4,639
CCO	24.8%	19.9%	18,811
CCO with conviction	3.5%	4.0%	3,467
Fine	32.8%	39.8%	33,697
Conviction only	5.8%	3.0%	3,307
CRO w/o conviction	5.0%	16.5%	11,976
No conviction	1.5%	4.7%	3,409
Total	100.0%	100.0%	88,723

Source: NSW Bureau of Crime Statistics and Research, reference 24-23463.

Figure 1.4: NSW higher and local criminal courts, proportion of each penalty imposed on Aboriginal and non-Aboriginal men, 2023

	Aboriginal		Non-Aboriginal/ unknown	
	No	%	No	%
Prison > 6 mth	2,967	45.8	3,515	54.2
Prison ≤ 6 mth	1,616	55.1	1,319	44.9
ICO	1,581	34.1	3,058	65.9
CCO	5,720	30.4	13,091	69.6
CCO with conviction	810	23.4	2,657	76.6
Fine	7,569	22.5	26,128	77.5
Conviction only	1,334	40.3	1,973	59.7
CRO w/o conviction	1,153	9.6	10,823	90.4
No conviction	336	9.9	3,073	90.1
Total	23,086	26.0	65,637	74.0

Source: NSW Bureau of Crime Statistics and Research, reference 24-23463.

Figure 1.5: Distribution of penalties among Aboriginal women and non-Aboriginal women in NSW higher and local criminal courts, 2023

	Aboriginal (N=8,357)	Non-Aboriginal/ unknown (N=17,123)	Total offenders
Prison > 6 mth	3.9%	1.5%	585
Prison ≤ 6 mth	2.9%	0.7%	360
ICO	5.7%	3.3%	1,037
CCO	25.1%	16.5%	4,915
CCO with conviction	6.6%	4.8%	1,369
Fine	37.0%	37.4%	9,503
Conviction only	5.5%	3.0%	971
CRO w/o conviction	11.0%	24.8%	5,174
No conviction	2.2%	8.1%	1,566
Total	100.0%	100.0%	25,480

Source: NSW Bureau of Crime Statistics and Research, reference 24-23463.

Figure 1.6: NSW higher and local criminal courts, percentage of each penalty imposed on Aboriginal and non-Aboriginal women, 2023

	Aboriginal		Non-Aboriginal/ unknown	
	No	%	No	%
Prison > 6 mth	330	56.4	255	43.6
Prison ≤ 6 mth	243	67.5	117	32.5
ICO	477	46.0	560	54.0
CCO	2,095	42.6	2,820	57.4
CCO with conviction	555	40.5	814	59.5
Fine	3,094	32.6	6,409	67.4
Conviction only	460	47.4	511	52.6
CRO w/o conviction	923	17.8	4,251	82.2
No conviction	180	11.5	1,386	88.5
Total	8,357	32.8	17,123	67.2

Source: NSW Bureau of Crime Statistics and Research, reference 24-23463.

Figure 1.7: NSW higher and local criminal courts, proportion of penalties imposed in each region, 2023

	Major cities		Inner regional		Outer regional		Remote/ Very remote		Unknown	
	No	%	No	%	No	%	No	%	No	%
Prison > 6 mth	3,474	4.8	1,249	5.2	291	4.2	64	5.0	1,989	17.8
Prison ≤ 6 mth	1,452	2.0	480	2.0	134	2.0	22	1.7	1,207	10.8
ICO	3,671	5.0	1,358	5.6	347	5.1	75	5.9	225	2.0
CCO	15,164	20.7	5,473	22.6	1,595	23.2	314	24.5	1,180	10.6
CRO with conviction	3,190	4.4	1,132	4.7	328	4.8	66	5.2	122	1.1
Fine	28,793	39.4	8,787	36.3	2,660	38.7	429	33.5	4,755	42.7
Conviction only	2,520	3.4	888	3.7	262	3.8	71	5.5	573	5.1
CRO w/o conviction	11,424	15.6	3,875	16.0	1,013	14.7	187	14.6	679	6.1
No conviction recorded	3,402	4.7	994	4.1	239	3.5	53	4.1	415	3.7
Total	73,090	100.0	24,236	100.0	6,869	100.0	1,281	100.0	11,145	100.0

Source: NSW Bureau of Crime Statistics and Research, reference 24-23463.

Figure 1.8: Discharge of intensive correction orders, 2019 – 2023

Outcome	2019		2020		2021		2022		2023	
	No	%	No	%	No	%	No	%	No	%
Completed	9217	61.8	16660	71.9	17842	72.6	16859	72.9	14861	70.6
Revoked	4938	33.1	5564	24	5314	21.6	5175	22.4	5105	24.3
Other*	755	5.1	962	4.1	1419	5.8	1100	4.8	1080	5.1
Total	14910	100	23186	100	24575	100	23134	100	21046	100

Source: Corrections Research Evaluation and Statistics, Response to request 1674.
* “Other” includes transfers, deceased and other.

Figure 1.9: Discharge of community correction orders, 2019 – 2023

Outcome	2019		2020		2021		2022		2023	
	No	%	No	%	No	%	No	%	No	%
Completed	12936	63.7	20584	75.6	20482	73.6	20827	77.6	19769	75.9
Revoked	5188	25.6	4670	17.2	3748	13.5	3011	11.2	3262	12.5
Other *	2170	10.7	1965	7.2	3612	13	2995	11.2	3032	11.6
Total	20294	100	27219	100	27842	100	26833	100	26063	100

Source: Corrections Research Evaluation and Statistics, Response to request 1674.
* "Other" includes transfers, deceased and other.

Figure 1.10: Discharge of conditional release orders, 2019 – 2023

Completed	2019		2020		2021		2022		2023	
	No	%	No	%	No	%	No	%	No	%
Completed	1495	67.9	2986	83.8	2636	82.7	2327	83.2	2567	86.8
Revoked	441	20	356	10	222	7	216	7.7	158	5.3
Other *	266	12.1	223	6.3	330	10.4	253	9	233	7.9
TOTAL	2202	100	3565	100	3188	100	2796	100	2958	100

Source: Corrections Research Evaluation and Statistics, Response to request 1674.
* "Other" includes transfers, deceased and other.

Figure 1.11: Number of conditional release orders without a conviction, breached, compared with number issued, 2019 – 2023

	2019	2020	2021	2022	2023
Issue	21,284	16,949	17,994	21,394	22,586
Breach	1,193	2,195	2,281	2,477	2,592

Source: NSW Bureau of Crime Statistics and Research, reference st24-23455.

Figure 1.12: Number of conditional release orders with a conviction, breached, compared with number issued, 2019 – 2023

	2019	2020	2021	2022	2023
Issue	8,966	6,553	6,563	7,703	7,787
Breach	2,478	2,326	1,928	1,952	2,022

Source: NSW Bureau of Crime Statistics and Research, reference st24-23455.

Figure 1.13: Outcomes of breach (number) for each conditional release order without a conviction, 2019 – 2023

	2019	2020	2021	2022	2023
Prison	5	13	19	8	9
ICO	13	11	12	13	15
CCO	166	268	227	194	199
CRO with conviction	86	123	117	123	156
Fine	311	567	622	669	603
Conviction only	58	132	162	150	200
Amended CRO w/o conviction	50	119	112	116	96
No conviction	6	3	3	0	4
No action	498	959	1,005	1,202	1,310
Total	1,193	2,195	2,279	2,475	2,592

Source: NSW Bureau of Crime Statistics and Research, reference st24-23455.

Figure 1.14: Outcomes of breach (percentage) for each conditional release order without a conviction, 2019 – 2023

	2019		2020		2021		2022		2023	
	No	%	No	%	No	%	No	%	No	%
Prison	5	0.4	13	0.6	19	0.8	8	0.3	9	0.3
ICO	13	1.1	11	0.5	12	0.5	13	0.5	15	0.6
CCO	166	13.9	268	12.2	227	10.0	194	7.8	199	7.7
CRO with conviction	86	7.2	123	5.6	117	5.1	123	5.0	156	6.0
Fine	311	26.1	567	25.8	622	27.3	669	27.0	603	23.3
Conviction only	58	4.9	132	6.0	162	7.1	150	6.1	200	7.7
Amended CRO w/o conviction	50	4.2	119	5.4	112	4.9	116	4.7	96	3.7
No conviction	6	0.5	3	0.1	3	0.1	0	0.0	4	0.2
No action	498	41.7	959	43.7	1,005	44.1	1,202	48.5	1,310	50.5
Total	1,193	100	2,195	100	2,279	100	2,475	100	2,592	100

Source: NSW Bureau of Crime Statistics and Research, reference st24-23455.

Figure 1.15: Outcomes of breach (number) for each conditional release order with a conviction, 2019 – 2023

	2019	2020	2021	2022	2023
Prison	157	120	68	76	58
ICO	86	66	42	30	53
CCO	679	482	347	243	245
Amended CRO with conviction	257	195	154	180	180
Fine	253	359	329	296	346
Conviction only	55	66	57	77	82
CRO w/o conviction	5	9	13	4	4
No conviction	6	0	0	0	0
No action	978	1,029	918	1,045	1,054
Total	2,476	2,326	1,928	1,951	2,022

Source: NSW Bureau of Crime Statistics and Research, reference st24-23455.

Figure 1.16: Outcomes of breach (percentage) for each conditional release order with a conviction, 2019 – 2023

	2019		2020		2021		2022		2023	
	No	%	No	%	No	%	No	%	No	%
Prison	157	6.3	120	5.2	68	3.5	76	3.9	58	2.9
ICO	86	3.5	66	2.8	42	2.2	30	1.5	53	2.6
CCO	679	27.4	482	20.7	347	18.0	243	12.5	245	12.1
Amended CRO with conviction	257	10.4	195	8.4	154	8.0	180	9.2	180	8.9
Fine	253	10.2	359	15.4	329	17.1	296	15.2	346	17.1
Conviction only	55	2.2	66	2.8	57	3.0	77	3.9	82	4.1
CRO w/o conviction	5	0.2	9	0.4	13	0.7	4	0.2	4	0.2
No conviction	6	0.2	0	0.0	0	0.0	0	0.0	0	0.0
No action	978	39.5	1,029	44.2	918	47.6	1,045	53.6	1,054	52.1
Total	2,476	100.0	2,326	100.0	1,928	100.0	1,951	100.0	2,022	100.0

Source: NSW Bureau of Crime Statistics and Research, reference st24-23455.

Figure 1.17: Number of community correction orders breached, compared with number issued, 2019 – 2023

	2019	2020	2021	2022	2023
Issue	56,830	52,367	49,385	48,106	52,236
Breach	13,154	23,975	24,006	22,977	23,363

Source: NSW Bureau of Crime Statistics and Research, reference st24-23455.

Figure 1.18: Outcomes of breach (number) for each community correction order, 2019 – 2023

	2019	2020	2021	2022	2023
Prison	1,932	3,476	3,154	2,913	2,690
ICO	1,499	2,347	2,228	1,689	1,774
Amended CCO	3,846	6,006	5,715	4,809	5,300
CRO with conviction	14	21	4	8	4
Fine	241	1,030	1,147	1,153	889
Conviction only	137	320	425	397	393
CRO w/o conviction	2	1	2	1	0
No conviction	1	6	1	1	5
No action	5,478	10,761	11,326	12,006	12,298
Total	13,150	23,968	24,002	22,977	23,353

Source: NSW Bureau of Crime Statistics and Research, reference st24-23455.

Figure 1.19: Outcomes of breach (percentage) for each community correction order, 2019 – 2023

	2019		2020		2021		2022		2023	
	No	%	No	%	No	%	No	%	No	%
Prison	1,932	14.7	3,476	14.5	3,154	13.1	2,913	12.7	2,690	11.5
ICO	1,499	11.4	2,347	9.8	2,228	9.3	1,689	7.4	1,774	7.6
Amended CCO	3,846	29.2	6,006	25.1	5,715	23.8	4,809	20.9	5,300	22.7
CRO with conviction	14	0.1	21	0.1	4	0.0	8	0.0	4	0.0
Fine	241	1.8	1,030	4.3	1,147	4.8	1,153	5.0	889	3.8
Conviction only	137	1.0	320	1.3	425	1.8	397	1.7	393	1.7
CRO w/o conviction	2	0.0	1	0.0	2	0.0	1	0.0	0	0.0
No conviction	1	0.0	6	0.0	1	0.0	1	0.0	5	0.0
No action	5,478	41.7	10,761	44.9	11,326	47.2	12,006	52.3	12,298	52.7
Total	13,150	100	23,968	100	24,002	100	22,977	100	23,353	100

Source: NSW Bureau of Crime Statistics and Research, reference st24-23455.

Figure 1.20: Conditions breached resulting in revocation of an ICO, 2019 – 2023

Condition	2019	2020	2021	2022	2023
Not offend	1186	1320	1184	1191	1359
Supervision	963	876	1199	713	636
Community Service	378	122	132	205	192
Intervention	44	14	27	216	157
Abstinence	61	22	21	35	48
Other *	33	17	22	35	41

Source: Corrections Research Evaluation and Statistics, Response to request 1674.
* Other: Home detention, electronic monitoring, non-association, curfew, place restriction

Figure 1.21: Outcomes where Parole Authority was satisfied a breach occurred, 2019 – 2023

Decision	2019		2020		2021		2022		2023	
	No	%	No	%	No	%	No	%	No	%
Revoke (e)	1776	70.7	1756	64.2	1592	69.5	1587	72.3	1628	65.5
Vary or delete conditions (d)	232	9.2	278	10.2	197	8.6	169	7.7	224	9.0
Impose conditions (c)	192	7.6	296	10.8	128	5.6	63	2.9	82	3.3
Formal warning (b)	185	7.4	257	9.4	246	10.7	357	16.3	427	17.2
Record breach, no further action (a)	128	5.1	150	5.5	129	5.6	20	0.9	123	5.0
TOTAL	2513	100	2737	100	2292	100	2196	100	2484	100

Source: Corrections Research Evaluation and Statistics, Response to request 1674.

Figure 1.22: Outcomes of reinstatement applications for intensive correction orders, 2019 – 2023

Action	2019	2020	2021	2022	2023
Reinstate ICO	469	293	213	183	253
Add conditions to reinstated ICO	139	119	26	0	0
Delete conditions from reinstated ICO	69	103	9	0	0
Decline application	2	1	1	0	0

Source: Corrections Research Evaluation and Statistics, Response to request 1674.

Figure 4.1: Proportion of penalties for ICO excluded offences, before and after the 2018 reforms, January 2014 – June 2023

Penalty	Pre-reform		Post-reform	
	No	%	No	%
Imprisonment	520	79.9	709	90.1
Suspended sentence	84	12.9	0	0
All other penalties	47	7.2	78	9.9
Total	651	100	787	100

Pre reform: January 2014-June 2018; Post-reform: October 2018- June 2023.
Source: NSW Bureau of Crime Statistics and Research, Dvn 2323063.

Figure 4.2: Proportion of penalties for ICO excluded offences for Aboriginal offenders, before and after the 2018 reforms, January 2014 – June 2023

Penalty	Pre-reform		Post-reform	
	No	%	No	%
Imprisonment	334	81.3	509	86.7
Suspended sentence	49	11.9	0	0
All other penalties	28	6.8	78	13.3
Total	411	100	587	100

Pre reform: January 2014-June 2018; Post-reform: October 2018- June 2023.
Source: NSW Bureau of Crime Statistics and Research, Dvn 2323063.

Figure 4.3: Proportion of penalties for ICO excluded offences of offenders not identified as Aboriginal, before and after the 2018 reforms, January 2014 – June 2023

Penalty	Pre-reform		Post-reform	
	No	%	No	%
Imprisonment	1,737	71.5	2,298	81.1
Suspended sentence	391	16.1	0	0
All other penalties	303	12.5	537	18.9
Total	2,431	100	2,835	100

Pre reform: January 2014-June 2018; Post-reform: October 2018- June 2023.
Source: NSW Bureau of Crime Statistics and Research, Dvn 2323063.

Figure 4.4: Proportion of penalties for ICO excluded homicide offences, before and after the 2018 reforms, January 2014 – June 2023

Penalty	Pre-reform		Post-reform	
	No	%	No	%
Imprisonment	254	98.1	266	99.3
Suspended sentence	3	1.2	0	0
All other penalties	2	0.8	2	0.7
Total	259	100	268	100

Pre reform: January 2014-June 2018; Post-reform: October 2018- June 2023.
Source: NSW Bureau of Crime Statistics and Research, Dvn 2323063.

Figure 4.5: Proportion of penalties for ICO excluded offences involving intercourse with children, before and after the 2018 reforms, January 2014 – June 2023

Penalty	Pre-reform		Post-reform	
	No	%	No	%
Imprisonment	520	79.9	709	90.1
Suspended sentence	84	12.9	0	0
All other penalties	47	7.2	78	9.9
Total	651	100	787	100

Pre reform: January 2014-June 2018; Post-reform: October 2018- June 2023.
Source: NSW Bureau of Crime Statistics and Research, Dvn 2323063.